Chicago-Kent Law Review

Volume 58 | Issue 3 Article 5

June 1982

The Silent Alternate Juror: A Violation of the Constitutional Right to Trail by Jury

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THE SILENT ALTERNATE JUROR: A VIOLATION OF THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY?

Johnson v. Duckworth
650 F.2d 122 (7th Cir. 1981)

The United States Constitution, as originally adopted in 1787,[1] guaranteed citizens the right to trial by jury in federal criminal prosecutions.[2] Four years later, the sixth amendment was adopted to enhance this constitutional right by providing for speedy and public trials with impartial juries.[3] Nevertheless, almost 200 years have elapsed since the inception of this right to trial by jury and it has yet to be fully defined. It was not until 1968, 100 years after the ratification of the fourteenth amendment,[4] that this federal right was defined to afford the citizens of individual states the right to trial by jury in state criminal prosecutions.[5] Even the most basic components of this right to trial by jury, such as the constitutionally required number of jurors,[6] the unanimity of the jury verdict,[7] and the crimes to which this right applies,[8] have only recently been defined by the United States Supreme Court. There are, however, many aspects of this constitutional guarantee which are still undeveloped and which are the basis of considerable dispute in state and federal courts today. One such major dispute concerns the jury deliberation process and the proper role of the alternate juror within that process.

State and federal courts have encountered repeated difficulties in determining the degree of privacy that should be accorded jury deliber-

1. U.S. CONST. art. VII.

2. U.S. CONST. art. III, § 2, cl. 3, provides, in part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where said Crimes shall have been committed . . . ."

3. U.S. CONST. amend. VI provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

4. U.S. CONST. amend. XIV, § 1, provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

5. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). In *Duncan*, the United States Supreme Court first held the sixth amendment guarantee of trial by jury applicable to the states through the due process clause of the fourteenth amendment. *See also* notes 3 & 4 *supra*.

6. *See* Ballew v. Georgia, 435 U.S. 223 (1978); Williams v. Florida, 399 U.S. 78 (1970).

7. *See* Apodaca v. Oregon, 406 U.S. 404 (1972).

8. *See* Baldwin v. New York, 399 U.S. 66 (1970).

ations.[9] It has been held a "cardinal principle" that the jury deliberation process remain private and secret.[10] This principle has been strictly enforced against officers of the court and members of the public to prevent their intrusion into the privacy of the jury deliberations.[11] However, it is not at all evident that the presence of a silent alternate juror during any portion of the deliberation process breaches this cardinal rule of privacy, and it is even less clear whether it presents a problem of constitutional magnitude.[12] In *Johnson v. Duckworth*,[13] the United States Court of Appeals for the Seventh Circuit, in a habeas corpus proceeding,[14] reviewed an Indiana Supreme Court decision[15] which upheld an Indiana trial court's directive that an alternate juror observe, but not participate in, the jury deliberations. The defendant objected to the alternate juror's presence in the jury room, contending that his constitutional right to trial by jury was impaired because this procedure resulted in an invasion of the jury's privacy that would stifle debate and inhibit the deliberation process.[16] The Seventh Circuit held that, while the procedure approved by the Indiana Supreme Court may not have been perfect, it was not such an invasion of the privacy of jury deliberations as to deprive the defendant of his constitutional right to trial by jury.[17]

9. In addition to the topics discussed in this comment, *see* 3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 15-5.7, commentary (2d ed. 1980) [hereinafter cited as ABA STANDARDS]; Comment, 23 BAYLOR L. REV. 445 (1971); Annot., 58 A.L.R.2d 556 (1958) for a discussion of how much evidence a court is permitted to obtain from a juror concerning the deliberation process for the purpose of impeaching the jury's verdict.

10. *See* United States v. Virginia Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964).

11. *See, e.g.*, Rickard v. State, 74 Ind. 275 (1881); People v. Knapp, 42 Mich. 267, 2 N.W. 927 (1879). *See also* note 149 *infra*.

12. *See* United States v. Meinster, 484 F. Supp. 442 (S.D. Fla. 1980), *aff'd in part and rev'd in part on other grounds sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) (allowed substitution of alternate juror after 1½ days of deliberations); United States v. Barone, 83 F.R.D. 565 (S.D. Fla. 1979) (allowed substitution of alternate juror eight days after deliberations began in complex criminal trial); Smith v. State, 241 Ind. 311, 170 N.E.2d 794 (1960) (presence of alternate juror in deliberations before formal discharge of absent regular juror who was ill was not error). *Cf.* State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975) (presence of alternate juror in deliberation room for three to four minutes after jury retired to consider its verdict was reversible error). *See also* Paisley, *The Federal Rule on Alternate Jurors*, 51 A.B.A.J. 1044 (1965) [hereinafter cited as Paisley] (suggesting that optimal use of the alternate juror system would permit substitution before and after deliberations have commenced); Note, *Criminal Law: Alternate Jurors: Substitution After Submission of Case: Presence During Deliberations of Jury*, 24 CALIF. L. REV. 735 (1936) [hereinafter cited as *Alternate Juror Note*] (discussing the development, up to 1936, of California's alternate juror system).

13. 650 F.2d 122 (7th Cir. 1981) (per curiam).

14. *See* note 158 *infra*.

15. Johnson v. State, 267 Ind. 256, 369 N.E.2d 623 (1977), *cert. denied sub nom.* Johnson v. Indiana, 436 U.S. 948 (1978).

16. 650 F.2d at 122-23.

17. *Id.* at 126.

This case comment will analyze the constitutionality of an alternate juror's silent observance of jury deliberations. A brief historical review will examine the development of state and federal alternate juror systems within the confines of the traditional belief that the jury deliberation process be as free from outside influence as possible. An examination of more recent decisions by state and federal courts will illustrate the modifications of the alternate juror system and the inconsistent interpretations among jurisdictions as to the optimal use of this system. The facts and the lower court history of *Johnson v. Duckworth* will be reviewed and the Seventh Circuit's opinion will be presented. Additionally, the *Duckworth* decision will be analyzed on a comparative basis with other jurisdictions and the future implications of the holding will be discussed. It will be shown that the Seventh Circuit's approval of Indiana's jury procedures is based upon sound legal reasoning and policy considerations; moreover, the constitutional guarantee of trial by jury is not impaired while the efficiency of the jury system is, in fact, enhanced.

HISTORICAL BACKGROUND

Development of the Alternate Juror System

At common law, the jury was composed of twelve persons.[18] The jury system was administered by the individual states, and defendants in state criminal proceedings acquired jury rights solely through state statutes and constitutions.[19] While the right to trial by a twelve-member jury in federal cases was assured by the federal Constitution,[20] rights relative to state jury trial and procedure were not determined by federal standards and often contradicted federal practice.[21] Rather

18. *See* Williams v. Florida, 399 U.S. 78 (1970). The origin of the twelve-member jury has been traced to the era of Henry II, King of England from 1139-1189. *See generally* Thayer, *The Jury and its Development*, 5 HARV. L. REV. 295 (1892). However, the fact that the common law jury was composed of twelve members seems to be largely an historical accident. While various rationales for this numerical composition have been proposed, there has been no definitive resolution. 399 U.S. at 97-102. *See, e.g.*, White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8, 15-18 (1961).

19. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968); Maxwell v. Dow, 176 U.S. 581 (1900); Walker v. Sauvinet, 92 U.S. 90 (1875); Note, *Ballew v. Georgia: A Move Toward Neo-Incorporationism*?, 36 WASH. & LEE L. REV. 313, n.3 (1979) [hereinafter cited as *Neo-Incorporationism*]. Prior to *Duncan*, jury rights in state criminal prosecutions depended solely upon state constitutions and statutes. *See* note 5 *supra* and notes 102-09 *infra* and accompanying text for a discussion of *Duncan*.

20. *See* Duncan v. Louisiana, 391 U.S. 145, 158-59 n.30 (1968); Patton v. United States, 281 U.S. 276, 288-90 (1930); Maxwell v. Dow, 176 U.S. 581, 586 (1900); Thompson v. Utah, 170 U.S. 343, 350 (1898); note 3 *supra*.

21. *See* Maxwell v. Dow, 176 U.S. 581 (1900). In *Maxwell*, a state constitutional provision providing for an eight-member jury in noncapital offense cases was upheld. The Court was em-

than clearly defining jury practice and procedure, many states, in their constitutions, merely preserved the right to trial by jury as it existed at the time of the adoption of the state constitution.[22] However, difficulties were encountered when the common law was silent in a novel situation or when its application resulted in inefficiency.[23] Courts and legislatures thus became involved in the alteration and codification of common law to meet the needs of a progressing legal system.[24]

The sanctity of the jury deliberation process became an issue of judicial concern in the mid-1800s.[25] In *People v. Knapp*,[26] an officer of the court retired to the deliberation room with the jury and remained there throughout the deliberation process. The Supreme Court of Michigan expressed the opinion that the jury retired from the presence

phatic that "States . . . [be] left to regulate trials in their own courts in their own way." *Id.* at 595. The states were to have complete control over their court procedures subject to the qualifications that the procedures could not deny defendants fundamental rights and could not "conflict with specific and applicable provisions of the Federal Constitution." *Id.* at 605. Thus, the states were free to implement their own court practices and procedures with respect to jury trials; the adoption of the fourteenth amendment did not require states to incorporate federal practices. *Id.* at 603-04. *See* note 4 *supra* and accompanying text.

22. *See, e.g.*, People v. Kelly, 203 Cal. 128, 263 P. 226 (1928); People v. Powell, 87 Cal. 348, 25 P. 481 (1891); Swart v. Kimball, 43 Mich. 443, 5 N.W. 635 (1880); State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975); Whitehurst v. Davis, 3 N.C. 110 (1800); *Alternate Juror Note*, *supra* note 12, at 736 n.5. *See generally* T. COOLEY, CONSTITUTIONAL LIMITATIONS 74 (4th ed. 1878).

23. *See, e.g.*, Patton v. United States, 281 U.S. 276 (1930). In *Patton*, the defendants were charged with a crime that carried a prison sentence. Eight days after the trial commenced, one of the twelve jurors became ill and was unable to continue. Rather than impanel another jury and begin the trial anew, *see* notes 31-33 *infra* and accompanying text, the government and counsel for the defendants stipulated in open court that the trial should proceed with the remaining eleven jurors. After a guilty verdict was rendered by the eleven jurors, the defendants appealed on the ground that they had no power to waive their constitutional right to a twelve-member jury. 281 U.S. at 286-87. The Supreme Court noted that the federal law required a trial by jury as understood and applied at common law, and one of the necessary elements of a common law jury was that it "should consist of twelve men, neither more nor less." *Id.* at 288. However, upon review of several state court decisions allowing waiver of the twelve-member jury requirement, and arguably considering the consequences of requiring new trials in all similar situations, the Court held that a defendant may waive the right to a twelve-member jury just as he may waive the right to a jury trial altogether. *Id.* at 290-92. *See also* notes 33-36 & 50 *infra* and accompanying text.

24. *See, e.g.*, Patton v. United States, 281 U.S. 276 (1930); People v. Peete, 54 Cal. App. 333, 202 P. 51 (1921); *Alternate Juror Note*, *supra* note 12, at 736. *See also* State v. Dalton, 206 N.C. 507, 174 S.E. 422 (1934).

25. Luster v. State, 30 Tenn. 118 (1850); Slaughter v. State, 24 Tex. 410 (1859); *see Alternate Juror Note*, *supra* note 12, at 738 nn.11, 13 & 14 for collection of cases. It was also in this era that a divergence among states occurred which still exists today. A minority of states held that the mere presence of an officer of the court in the jury room during any part of the deliberation process was cause for reversal. Rickard v. State, 74 Ind. 275 (1881); Gandy v. State, 24 Neb. 716, 40 N.W. 302 (1888). The majority rule was that the presence of an officer of the court, or a total outsider, in the jury room did not constitute reversible error unless there was a showing of prejudice to the defendant. State v. Beste, 91 Iowa 565, 60 N.W. 112 (1894) (officer of the court present); State v. Bailey, 32 Kan. 83, 3 P. 769 (1884) (officer of the court present); Thomason v. Territory, 4 N.M. 150, 13 P. 223 (1887) (outsider present); Commonwealth v. Lombardi, 221 Pa. 31, 70 A. 122 (1908) (outsider present). *See* notes 67-97 *infra* and accompanying text.

26. 42 Mich. 267, 3 N.W. 927 (1879).

of the court solely for the opportunity of private and confidential debate and that the presence of a single other person in the room could cause such an intrusion upon that privacy that the entire purpose for retiring to deliberate would be defeated.[27] The *Knapp* court placed special emphasis on the fact that the intruder into the jury deliberations was an officer of the court. It stated that while the jurors had a self-interest in the preservation of the secrecy of the deliberations, the officer had no such corresponding interest and that it was through this avenue that "news-gatherers" and "scandalmongers" could receive and subsequently disburse information which may not have been otherwise publicly expressed by the jurors.[28] In addition, the court recognized that knowledge of what the officer might reveal to the public of the deliberations could curtail uninhibited juror debate. However, the court also acknowledged that the officer's mere presence might restrain the jurors' freedom of debate, thereby accomplishing the same result.[29] Subsequent court rulings and statutory limitations on the actions of bailiffs and officers of the court illustrated a general acceptance of the Michigan Supreme Court's analysis of the need for privacy.[30]

At the same time that courts were attempting to ensure the privacy of the jury deliberation process, efforts were also being made to increase the efficiency of the jury system. At common law, there was no alternate juror system. Consequently, when a juror became ill or incapacitated, the entire jury was discharged, the remaining eleven eligible jurors were immediately recalled, along with one new member, and the entire jury was impaneled *de novo*.[31] After this procedure was completed, the trial began anew.[32]

To avoid repetition of the trial, most states implemented procedures, by statute or by rule of court, for the selection of alternate or additional jurors.[33] The most common rule calls for an alternate or substitute juror. In this situation, one or more persons above the required jury number are chosen and specifically designated as alternates

27. *Id.* at 269-70, 3 N.W. at 929. The *Knapp* court noted that the opportunity for private debate was deemed a necessity and was assumed by the court in every case unless the jury expressly notified the court to the contrary. *Id.*

28. *Id.* at 270-71, 3 N.W. at 930-31.

29. *Id.* at 271, 3 N.W. at 931.

30. *See, e.g.*, Rickard v. State, 74 Ind. 275, 278 (1881). *See also* note 25 *supra* and note 149 *infra*.

31. When a jury is impaneled *de novo*, the jury is impaneled "anew" or "a second time." BLACK'S LAW DICTIONARY 392 (5th ed. 1979).

32. *See* People v. Henderson, 45 Ill. App. 3d 798, 800, 359 N.E.2d 909, 911 (5th Dist. 1977), *aff'd sub nom.* Henderson v. Lane, 613 F.2d 175 (7th Cir. 1980); *see generally Alternate Juror Note*, *supra* note 12; ABA STANDARDS, *supra* note 9, at 72.

33. *See* Annot., 84 A.L.R.2d 1288, 1290 (1962); ABA STANDARDS, *supra* note 9, at 72.

before the trial begins. If a regular juror is dismissed, the alternate takes his place. Many states allow substitution only up until the time the jury retires to deliberate; upon jury retirement, the alternate is dismissed.[34] In some jurisdictions, substitution is allowed after the jury retires and prior to the time of first verdict. In most of these jurisdictions the alternate juror is isolated in a separate room until the regular jury returns a verdict.[35]

The second system is called the additional or eliminated juror system. Under this system, one or more jurors, in addition to the number of regular jurors required, are selected in advance of trial. If a juror must be dismissed during trial, it is done without any further action at that time. If more than the required number of jurors remain when the jury is to retire, those who shall determine the verdict are selected by lot.[36] Both of these statutes have consistently been held constitutional by the courts.[37] In implementing these alternate juror systems, however, the states apparently never contemplated the presence of a silent alternate juror in the deliberation room or whether such a procedure would be constitutional.[38]

34. *See, e.g.*, PA. STAT. ANN. tit. 234, § 1108(a) (Purdon) (1980).

35. *See, e.g.*, CAL. PENAL CODE §§ 1089 & 1123 (Deering) (1982); GA. CODE § 59 (1981).

36. *See, e.g.*, MASS. ANN. LAWS ch. 234, § 26B (West) (1980); N.J. STAT. ANN. § 2A:74-2 (West) (1976). A preference has sometimes been expressed for the additional or eliminated juror system on the basis that one designated as an alternate from the outset may not take his jury duty as seriously as one who realizes that, for example, out of the thirteen or fourteen jurors present, twelve will be selected and that there is a very high probability that he will be one of those deliberating toward a final verdict. ABA STANDARDS, *supra* note 9, at 72-73. As a general rule, in most jurisdictions the decision whether to select alternate or additional jurors usually rests in the sole discretion of the trial judge. However, selection of alternate jurors who are not needed, or the failure to cause such jurors to be selected with a resulting mistrial, will not result in a challenge of the judge's exercise of discretion. *Id.* at 73. *See, e.g.*, United States v. Roby, 592 F.2d 406 (8th Cir.), *cert. denied*, 442 U.S. 944 (1979); State v. Heemer, 24 Utah 2d 69, 475 P.2d 1008 (1970).

37. These procedures have been attacked under two main theories. The first theory, the double jeopardy theory, is premised on the notion that jeopardy attaches at the time the first jury is sworn to decide the case and allowing one of the regular jurors to be replaced with an alternate is tantamount to swearing in a new jury, thus placing the defendant in double jeopardy because there is a second trial for the same offense by the same sovereign. *See, e.g.*, Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967); State v. Bircher, 573 P.2d 1128, 1129-30 (Kan. App. 1978); State v. Sallee, 8 Ohio App. 2d 9, 11, 220 N.E.2d 370, 371-72 (1966). The second theory, that the alternate juror system violates the constitutional guarantee of trial by jury, consists of the idea that, because there has been a substitution or replacement, the defendant is no longer being tried by the statutorily required number of jurors but by a jury consisting of more members than the statute mandates. This argument has been rejected, largely on the ground that, at any given time, there are no greater or less members of the deliberating jury than the statute requires. There is only a different juror who has been subject to the same voir dire process and who has heard the same evidence as the replaced juror. *See, e.g.*, People v. Ryan, 19 N.Y.2d 100, 101-05, 278 N.Y.S.2d 199, 201-03, 224 N.E.2d 710, 711-13 (1966). Both of these theories have consistently been rejected by the courts. *See* Annot., 84 A.L.R.2d 1288, 1292-98 & 1309-10 (1962).

38. *See, e.g.*, ABA STANDARDS, *supra* note 9, at 75.

The Silent Alternate Juror in State Courts

In 1935, the issue of the alternate juror silently observing jury deliberations was first faced by a state supreme court. In *People v. Britton*,[39] the California Supreme Court held that the procedure constituted reversible error because it violated a California statute that required that the alternate juror be kept in the custody of the sheriff during deliberations, and because it breached the strict privacy the court felt should be afforded the jury deliberation process.[40] A similar result was reached by the Pennsylvania Superior Court in *Commonwealth v. Krick*.[41] In *Krick*, the court found reversible error when two alternates were permitted to retire with the jury but were withdrawn ten minutes later when counsel for the defendant objected to their presence in the jury room. A Pennsylvania statute provided that alternate jurors were not to participate in the jury deliberations and the court held that to even allow them an opportunity for such participation was in direct violation of the provision.[42] In *Glenn v. State*,[43] reversible error was found where the trial court permitted an alternate juror to observe, but not participate in, the deliberations. This procedure was in direct contravention of a Georgia statute that specifically prohibited the alternate from retiring with the jury; thus, the court considered reversal mandatory.[44] Similar decisions rendered on the "silent observance" issue in other jurisdictions also relied on state statutes and constitutions regulating the dismissal of alternates and providing for trial to a jury composed only of an exact number of jurors as a basis for reversal.[45]

39. 4 Cal. 2d 622, 52 P.2d 217 (1935).

40. *Id.* at 622-23, 52 P.2d at 217. In *Britton*, the California Supreme Court adopted the holding of People v. Bruneman, 4 Cal. App. 2d 75, 40 P.2d 891 (1935). In both cases, it was held reversible error when the trial court permitted alternate jurors to sit in on the jury deliberations, even though the alternates had been instructed that they were to take no part in the proceedings and there was no evidence that the presence of the alternates in any way influenced the verdict. In *Bruneman*, defendant's counsel had even assented to the procedure. Both decisions were based on section 1089 of the California Penal Code, CAL. PENAL CODE § 1089 (Deering) (1937), which had been amended in 1933 to provide for the discharge of alternates when the regular jurors were dismissed, and which was construed as allowing substitution of an alternate for a regular juror after the jury had retired to deliberate. People v. VonBadenthal, 8 Cal. App. 2d 404, 48 P.2d 82 (1935). The court reasoned that the legislature had not intended and, in fact, had not authorized the court to allow alternate jurors to observe the deliberations; thus, notwithstanding the fact that there was no evidence of any influence on the regular jurors by the presence of the alternates, there was an invasion of the defendant's right to trial by jury. The court further concluded that this invasion was so destructive that it could not be rendered harmless by consent and thus reversal was required. 4 Cal. App. 2d at 79, 40 P.2d at 893.

41. 164 Pa. Super. Ct. 516, 67 A.2d 746 (1949).

42. *Id.*

43. 217 Ga. 553, 123 S.E.2d 896 (1962).

44. *Id.*

45. *See, e.g.*, Brigman v. State, 350 P.2d 321 (Okla. Crim. 1960). In *Brigman*, an alternate

Thus, through the formative years of the alternate juror system, the prevailing view among the states was that the presence of an alternate juror in the jury room during deliberations violated jury privacy, even though the alternate juror took no part in the debate,[46] his presence was consented to,[47] and there was no evidence that the alternate in any way influenced the deliberating jury.[48] However, in federal courts the alternate juror's role has been subject to a variety of interpretations, notwithstanding a federal rule of procedure that purports to define the alternate's specific role.

The Alternate Juror System in the Federal Courts

In *United States v. Virginia Erection Corp.*,[49] a federal court was first presented with the issue of the silent alternate juror observing the jury deliberation process. This case also provided the federal court system with its first opportunity to apply the new Federal Rules of Crimi-

juror retired with the regular jurors and took part in the first ballot before he was discovered and dismissed. Even though the first ballot was more favorable to the defendant than any of the succeeding ballots, the appellate court held that the defendant's fundamental rights had been violated when thirteen jurors had participated in the deliberations. The Oklahoma Constitution had been interpreted to allow an accused to waive the right to trial by jury and to even agree to be tried by a lesser number than twelve, *see generally* note 50 *infra*, but the court held that this in no way provided for a jury of more than twelve and reversed the conviction with an order for a new trial. 350 P.2d at 323. *Cf.* People v. French, 12 Cal. 2d 720, 87 P.2d 1014 (1939), *overruled on other grounds*, People v. Valentine, 28 Cal. 2d 121, 169 P.2d 1 (1946) (contention of reversible error was rejected where jury was to deliberate in courtroom and alternates had been present in courtroom only a few minutes with the regular jury while the room was being put in order); Smith v. State, 241 Ind. 311, 170 N.E.2d 794 (1960) (fact that regular juror had taken ill and was removed to her home and the alternate was placed in jury deliberations, before formal discharge of regular juror by the court, was held to be mere irregularity and not cause for reversal where, upon defendant's counsel's objection, alternate was removed, a hearing was conducted by the court and the ill juror was properly discharged before the alternate was allowed to participate further in the deliberations).

46. *See* People v. Britton, 4 Cal. 2d 622, 52 P.2d 217 (1935); People v. Bruneman, 4 Cal. App. 2d 75, 40 P.2d 891 (1935); note 40 *supra* for a discussion of the *Bruneman* and *Britton* cases.

47. *See* People v. Bruneman, 4 Cal. App. 2d 75, 40 P.2d 891 (1935).

48. *See* notes 40 & 46-47 *supra* and accompanying text. The alternate juror role has been less harshly construed when the alternate juror is not a party to the actual deliberation process. *See* People v. Cox, 174 Cal. App. 2d 30, 344 P.2d 399 (1959) (court rejected argument that allowing alternate juror to sit with regular jurors during dinner was tantamount to permitting an unauthorized person to be present during deliberations); Ruffin v. State, 50 Del. 83, 123 A.2d 461 (1956) (no constitutional violation was found where alternate jurors were permitted to mingle with regular jurors, both in and out of the jury room, prior to submission of the case to the regular jury, in the absence of any showing of improper conduct by alternates). *Accord*, Commonwealth v. Coleman, 179 Pa. Super. Ct. 1, 115 A.2d 811, *aff'd*, 383 Pa. 474, 119 A.2d 261 (1955), *cert. denied*, 351 U.S. 938 (1955). *Cf.* People v. Cocco, 305 N.Y. 282, 113 N.E.2d 422 (1953) (contact between juror and former alternate held to require reversal when the discharged alternate made disparaging statements about the defendant's character to the regular juror, even though the juror said the statements did not influence her in the deliberations and she had not revealed the information to any of the other jurors).

49. 335 F.2d 868 (4th Cir. 1964).

nal Procedure to such a jury practice.[50] Rule 23 of the federal rules allows a defendant to waive a jury trial altogether or to waive a twelve-member jury and be tried by a jury of a lesser number.[51] Rule 24(c) defines the alternate juror procedure: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."[52] In *Virginia Erection*, the district court permitted the

50. The Federal Rules of Criminal Procedure were promulgated and adopted by the United States Supreme Court subsequent to Patton v. United States, 281 U.S. 276 (1930). *See* United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964). *Patton* is an interesting illustration of the Supreme Court's willingness to re-examine its prior declarations regarding the nature of jury trials in almost every aspect *but* the twelve-man jury requirement. *See* note 23 *supra* for a discussion of the facts in *Patton*. Because at common law the jury consisted of twelve persons, *see* note 18 *supra*, most states provided for twelve-member juries and the prevailing belief was that the framers of the Constitution intended to preserve this right. *See* Tigar, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 165-66 (1970) (the author suggests that the lack of debate surrounding the adoption of the sixth amendment indicates an intent to preserve the common law jury with its twelve-member tradition); *Neo-Incorporationism*, note 19 *supra*. *Patton* reaffirmed the requirement of twelve-member juries in federal courts while implementing the novel assertion that the requirement could be waived. *See* Williams v. Florida, 399 U.S. 78, 92 n.31 (1970). It was decided in *Patton* that trial to a jury could be waived by a defendant and, if this right could be waived, the defendant might similarly relinquish his right to a constitutionally composed (twelve-member) jury and submit to a jury of a lesser number. However, before any such waiver would be considered effective, sanction of the court and consent of government counsel must have been received, in addition to the "express" and "intelligent" consent of the defendant. 281 U.S. at 312. *See also* United States v. Virginia Erection Corp., 335 F.2d 868, 870 (4th Cir. 1964). Relying on the *Patton* decision, the Federal Rules of Criminal Procedure were enacted. The rules, having the force and effect of law, are binding on district judges conducting criminal trials in the federal court system. *Id.* at 870; Navarro v. United States, 400 F.2d 315, 318 (5th Cir. 1968).

51. Rule 23 provides:

> (a) *Trial by Jury*. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.
>
> (b) *Jury of Less than Twelve*. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

FED. R. CRIM. P. 23.

52. FED. R. CRIM. P. 24(c). Rule 24(c), as initially promulgated, provided, in relevant part:

> (c) *Alternate Jurors*. The court may direct that not more than 4 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Id. In 1966, rule 24(c) was amended to provide for not more than six alternate jurors based on the experience that four alternates were often inadequate in lengthy criminal trials. *See, e.g.*, United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961). In addition, the words "or are found to be" were added to the second sentence, which now reads: "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become *or are found to be* unable or disqualified to perform their duties." FED. R. CRIM. P. 24 (Advisory Committee's Note—1966) (emphasis added). This modification was included to make it clear that an alternate could replace a regular juror when it was discovered for the first time during trial that

alternate juror to attend, but not participate in, the jury deliberations pending determination of the ability of one of the regular jurors to proceed due to possible ill health.[53] The district court record indicated that counsel for both the government and the defendants had agreed to this procedure, but there was nothing in the record to indicate the defendants' *personal* consent.[54] In reversing and remanding the case for a new trial,[55] the Fourth Circuit adopted a very strict construction of the Federal Rules of Criminal Procedure.[56] The court held that the defendants could stipulate to a trial with less than twelve jurors but nothing in rule 23(b) provided for a jury with more than twelve members.[57] In addition, since the court found nothing in the record to indicate that the defendants had personally consented,[58] the court considered reversal mandatory.[59] Rule 24(c) was also meticulously construed in its requirement that the alternate be dismissed after the jury retires to deliberate.[60] Since this procedure had also not been complied with, the court found an additional basis for ordering reversal.[61]

the regular juror had been unable or disqualified at the time he was sworn to be a jury member. *Id. See* United States v. Goldberg, 330 F.2d 30 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964).

53. 335 F.2d at 869. The district court was concerned about a mistrial because a previous trial of defendants had resulted in a mistrial and the second trial had already been in progress several days. *Id.* at 869 n.2.

54. *Id.* at 870 n.3.

55. *Id.* at 873.

56. *See* notes 51 & 52 *supra*.

57. 335 F.2d at 871. *See* note 51 *supra*.

58. 335 F.2d at 870-71. *See* note 51 *supra* for a discussion of the *Patton* requirement that the court receive the "express" and "intelligent" consent of the defendant before stipulation to a jury composed of less than twelve members will be upheld. The district court apparently equated the *Patton* criteria with this situation, even though the procedure violated the mandates of the criminal rules and was not similar to the fact situation presented in *Patton*.

59. 335 F.2d at 870 n.3. Even if the defendants had consented to the alternate's presence in the jury deliberations, it is doubtful that the Fourth Circuit, under the strict construction adopted by it, would have allowed the trial to stand because there is no provision in rule 23(b) allowing a defendant to consent to an alternate's presence during deliberations. The only modification that a defendant may consent to, under rule 23(b), is a lesser-numbered jury.

60. *Id.* at 871-72. *See* note 52 *supra*. Considering the history leading to the adoption of rule 24(c), the court noted that a procedure had been considered which would have permitted substitution after the deliberations had commenced. The provision was rejected after the constitutionality and desirability of such a procedure were questioned by the Supreme Court. *Id.* at 871. *See* Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1962). *Cf.* Paisley, *supra* note 12, at 1044 (the author suggests that substitution after deliberations have commenced would be an improvement of the existing alternate juror system).

61. 335 F.2d at 873. The circuit court noted other irregularities which could have had an impact on their decision to reverse. The first uncertainty dealt with the trial court's instructions to the alternate and ill jurors. It was apparently unclear from the record who was to determine when, and if, the regular juror should be replaced. It was questioned whether this strictly judicial function, though clearly recognized as such by the parties, had been improperly delegated to the alternate and ill jurors. The second possible ground for reversal involved the neutrality of the apparently ill juror, Miss Furr. In accord with local custom, the jury had been allowed to question the witnesses and Miss Furr asked two questions that the trial judge felt seemed to favor the

In contrast to the strict precedent set by *Virginia Erection*, the Second and Ninth Circuits immediately felt compelled to make exceptions to the mandates of the rules. In *Leser v. United States*,[62] the Ninth Circuit allowed substitution of an alternate juror for an ill regular juror after several hours of deliberations.[63] Counsel for the government and the defendants had stipulated to the trial procedure in open court in the presence of the defendants, who expressed no objection to the procedure.[64] However, on appeal, the defendants' only contention was that *they* had not specifically assented.[65] The Ninth Circuit, affirming the lower court's conviction, held that by not objecting to the procedure in the trial court, the defendants "knowingly and intelligently acquiesced in the voluntary stipulation of their counsel."[66]

In *United States v. Hayutin*,[67] the Second Circuit carefully extricated itself from the literal mandates of rule 24(c) and introduced a new element to the federal alternate juror rule. In *Hayutin*, three alternate jurors were retained after the jury retired to deliberate but they were isolated in a separate room.[68] The trial judge refused the defend-

defense; in fact, one of the questions seemed not to be a question at all but more of an argument that could have been made by the defense. The nature of the questions, in addition to statements made by Miss Furr to the clerk and the court reporter, raised the issue of whether Miss Furr was prejudiced against the government and the trial judge conducted a hearing in an attempt to determine any such prejudice. However, the Fourth Circuit found that such an interrogation may have operated as a restraint upon Miss Furr's ability to function as a juror. *Id.* at 871-73. Even though these irregularities were present, it is apparent that at least one of the principal grounds for reversal was the presence of the alternate juror in the jury room during the deliberations in contravention of rules 23(b) and 24(c).

62. 358 F.2d 313 (9th Cir.), *cert. dismissed*, 385 U.S. 802 (1966), *petition to vacate denied*, 390 F.2d 634 (9th Cir.), *cert. denied*, 391 U.S. 953 (1968).

63. *Id.* at 318.

64. *Id.* at 315.

65. *Id.* at 315-16. The court noted that the defendants did "not contend that they did not comprehend the stipulation which was certainly intelligible to any person of ordinary understanding." *Id.* at 317.

66. *Id.* The Ninth Circuit apparently found that the right to stipulate to such a substitution after deliberations had begun was permitted by the *Patton* decision, and the court evidently concluded that the failure to object with knowledge of the procedure was equivalent to the *Patton* criteria of "express" and "intelligent" consent by the defendant. *See* notes 23, 50 & 58 *supra*. The court then interpreted *Virginia Erection* as holding that rules 23(b) and 24(c) are violated when there are more than twelve jurors present and distinguished *Leser* on the grounds that there were only twelve jurors at all times. 358 F.2d at 318. The court, though obviously aware of the statement in *Virginia Erection* explaining the reason for the exclusion of the provision allowing substitution after deliberations had begun, *see* note 60 *supra*, apparently felt that its situation called for compromise in view of the fact that the trial had taken seven weeks and produced more than 4,000 pages of trial transcript. 358 F.2d at 313. Thus, the Ninth Circuit held that rules 23(b) and 24(c) could be waived by the defendants' attorneys, as long as the defendants knew that their attorneys were waiving the mandates of the rules and made no objection in court, even though the rules of procedure provide for no such waiver. *Id.* at 318.

67. 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968), *subsequent appeal sub nom.* United States v. Nash, 414 F.2d 234 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969).

68. *Id.* at 950.

ants' requests to discharge the alternates and the defendants contended on appeal that this refusal was error.[69] The Second Circuit made a number of statements about rule 24(c), all indicating that a literal interpretation was preferable;[70] it then proceeded to depart from the rule.[71] The court held that, since the defendants had not been prejudiced by the sequestration of the alternates, a reversal was unnecessary, even though the procedure violated rule 24(c).[72] Nonetheless, the Second Circuit did seem to indicate that, aside from the specific fact situation presented, it could be expected to follow *Virginia Erection's* strict interpretation of the Federal Rules of Criminal Procedure.[73]

In light of the *Leser* and *Hayutin* deviations from the strict precedent established in *Virginia Erection*, it became apparent that an acceptable interpretation of the Federal Rules of Criminal Procedure was still being sought in the circuit courts. The Tenth Circuit apparently sanctioned the strict construction of the rules set by the Fourth Circuit in *Virginia Erection*, while the Fourth Circuit itself began to express dismay about the stringent precedent it had established. *United States v. Beasley*[74] and *United States v. Chatman*[75] presented similar fact situations to the Tenth and Fourth Circuits. In both cases, an alternate juror accidentally retired to the deliberation room with the regular jurors. In *Beasley*, the Tenth Circuit considered two possible options: *Virginia Erection's* "per se reversible error" rule[76] and *Hayutin's* "reversible error if prejudice to the defendant is found" rule.[77] The Tenth

69. *Id.*

70. *Id.* The court expressly stated that "[t]he absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24." *Id.*

71. *Id.* at 950-51.

72. *Id.* It is arguable that the prejudice element was considered because of the early decisions of some courts holding that the presence of officers of the court or outsiders did not mandate reversal unless prejudice to the defendant was shown as a result of the invasion of the deliberation process. *See* note 25 *supra*.

73. 398 F.2d at 950-51. The Second Circuit, while upholding the district court's conviction because there was no showing of prejudice to the defendants, expressed some confusion as to the reason the alternates had been retained. Counsel for the government explained that the procedure presented counsel with the option of stipulating to substitution of an alternate after deliberations had begun in the event a regular juror became ill or unable to continue. The Second Circuit expressed the opinion that this reason was "no reason in the absence of any rule or statute authorizing such consent." *Id.* at 950. *Compare* notes 58 & 66 *supra with* note 73. *See* note 277 *infra* and accompanying text.

74. 464 F.2d 468 (10th Cir. 1972).

75. 584 F.2d 1358 (4th Cir. 1978).

76. 464 F.2d at 469. The rule is called the "*per se* reversible error rule" because, once the *Virginia Erection* court determined that the Federal Rules of Criminal Procedure had been violated, it considered reversal mandatory, if not automatic. *See* United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978); United States v. Allison, 481 F.2d 468, 471 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

77. 464 F.2d at 469-70. *See* notes 67-73 *supra* and accompanying text.

Circuit adopted strict compliance with rule 24(c).[78] In *Chatman*, however, the Fourth Circuit was of the opinion that there was only one option available to it as a result of the strict precedent it had established in *Virginia Erection*.[79] The court noted that the case against the defendant was strong, his defense was frivolous and the appeal had little merit, other than the accidental presence of the alternate juror in the deliberation room for the first 45 minutes of the deliberations.[80] Nevertheless, the Fourth Circuit, albeit reluctantly,[81] ordered reversal because *Virginia Erection* required that result.[82]

The Fifth Circuit, on the other hand, appears to have blatantly rejected the strict standard established in *Virginia Erection* while adopting the prejudice test enunciated in *Hayutin*. In *United States v. Allison*,[83] the only issue on appeal to the circuit court was the presence of the alternate juror in the jury room for the first portion of the deliberations.[84] In the district court, at the conclusion of a three-week trial, it was brought to the attention of the trial judge that one of the regular jurors had been ill the night before the deliberations were to commence. The regular juror's ability to continue was uncertain[85] and the

78. 464 F.2d at 469-70. The *Beasley* court found itself in a compromising situation because the alternate had not only retired with the regular jury but she had voted to select a foreman and to go to lunch. Unlike the situation in *Virginia Erection*, the jury had consisted of thirteen participating members before the alternate was discovered and dismissed. *Id.* at 469. The Tenth Circuit, though considering the option presented by *Hayutin's* prejudice test, concluded that a showing of the alternate's participation or non-participation in the deliberations did not provide an appropriate standard of the "prejudice" test. In addition, the court felt that a hearing to inquire of such participation was, in itself, a "dangerous intrusion into the proceedings of the jury." *Id.* at 470.

79. *See* notes 55-61 *supra* and accompanying text.

80. 584 F.2d at 1361. The circuit court, noting that the alternate was dismissed with no evidentiary inquiry to determine whether she had participated in the deliberations or not, intimated that such a hearing may have had an impact on its decision. Nevertheless, the fact that there was neither an objection to the alternate's presence in the trial court, nor a motion for a mistrial, was not sufficient to sustain the lower court's conviction as the Fourth Circuit interpreted *Virginia Erection* to require neither. *Id.* at 1361-62.

81. *Id.* at 1361. The court stated:

> Reluctantly (because we think that the case against defendant was so strong and his defense so frivolous), we think that we must notice the presence of the alternate in the jury room during part of the jury's deliberations as plain error, reverse the convictions and award defendant a new trial. [*Virginia Erection*] requires this result.

Id.

82. *Id.*

83. 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

84. *Id.* at 469.

85. *Id.* at 460-70. At this point the court presented the counsel for the government and the defense with three options. The first was to retain the alternate separate from the jury just in case he was needed; the trial judge expressed the opinion that this was probably the best procedure. The second option, the one ultimately chosen at the urging of defense counsel, was to allow the alternate to accompany the regular jury into deliberations with instructions that he was not to participate unless the regular juror was dismissed by the court. The final option was that all the lawyers could stipulate to proceed with only eleven jurors should the ill juror be unable to con-

defense counsel insisted that the best procedure would be to send the alternate to the jury room with the regular twelve jurors. This procedure was carefully explained in open court and the jurors were instructed that the alternate was in no way to participate in any portion of the deliberation process unless the regular juror was dismissed.[86] The jury deliberated for one and a half hours and after lunch it became apparent that the regular juror would be able to finish the proceedings.[87] The alternate juror was immediately discharged, the jury returned to the jury room and, after three more hours of deliberations, returned a verdict of guilty.[88] The objection to this procedure was raised for the first time on appeal to the Fifth Circuit, where the defendants contended that their sixth amendment right to trial by jury had been violated because they did not *personally* assent to the procedure.[89] Because at no time during the deliberations were there more than twelve participating jurors, the Fifth Circuit refused to rule on the constitutional arguments of the defendants[90] and further dismissed the contention that the procedure violated Federal Rule of Criminal Procedure 23(b).[91] In distinguishing *Virginia Erection*, the court noted that there "a new trial was necessitated by a combination of procedural irregularities which are not present in the instant case."[92] Further, the court distinguished *Beasley* on the basis of consent.[93] In *Beasley*, the alternate juror accidentally retired with the regular jury and participated in two votes; in *Allison* the defendants consented to and, in fact, requested the presence of the silent alternate juror.[94] The Fifth Circuit

tinue. Counsel for the government suggested that the trial judge dismiss the ill regular juror and substitute the alternate before deliberations began. The trial judge, however, did not believe that the regular juror's condition was sufficient justification for dismissal at that time. *Id.*

86. *Id.* at 470.

87. *Id.*

88. *Id.*

89. *Id.* *See* note 3 *supra* for the relevant text of the sixth amendment. It should be noted that defense counsel in the circuit court was not the same defense counsel that urged that the alternate juror be allowed to silently observe the jury deliberations in the district court. *See* 481 F.2d at 470.

90. 481 F.2d at 470. The defendants argued that their sixth amendment guarantee had been violated because they were powerless to consent to a jury in excess of twelve, even though the procedure was approved and, in fact, requested by their attorneys. The Fifth Circuit refused to rule on this argument because, in the court's view, "the defendants were not tried by a jury of thirteen, but rather by a jury composed of twelve members with an alternate observing a portion of the deliberations." *Id.*

91. *Id.* As a consequence of their determination that the jury was composed of only twelve members, the Fifth Circuit concluded that the charge of violation of Federal Rule of Criminal Procedure 23(b) was moot. *Id.* *See* note 51 *supra* for the text of rule 23.

92. 481 F.2d at 471. *See* note 61 *supra*.

93. 481 F.2d at 471. *See* notes 76-78 *supra* and accompanying text.

94. 481 F.2d at 471. The court did note, however, that faced with factual circumstances simi-

nevertheless felt that the possibility of prejudice should be considered. The court concluded that sufficient prejudice would be shown if the alternate had in any way participated in the deliberation process or if any regular juror had been inhibited in any manner by the presence of the non-participating alternate juror.[95] In remanding the case with directions for a limited evidentiary hearing,[96] the Fifth Circuit expressed no major objection to the presence of a "mute" alternate during the deliberations.[97]

Other federal court interpretations of rules 23(b) and 24(c) have likewise produced anomolous results, illustrating a general dissatisfaction in the federal courts with the principles enunciated in these rules.[98] In general, however, while the constitutionality of alternate juror procedures that deviate from the Federal Rules of Criminal Procedure has been raised as an issue in the federal courts, the courts have consistently avoided reaching the constitutional question.[99] Since the consti-

lar to those of *Virginia Erection* and *Beasley*, it too might be persuaded to conclude a mistrial was necessary. *Id.*

95. *Id.* at 472. *Cf.* United States v. Beasley, 464 F.2d 468 (10th Cir. 1972) (concluding that the participation or non-participation of the alternate juror in the deliberation process was not an appropriate standard for the prejudice test and that a hearing to determine whether or not there had been participation was a dangerous intrusion in itself). *See* note 78 *supra*.

96. 481 F.2d at 473. The evidentiary hearing was restricted to determinations of: (1) whether the alternate participated in any way; (2) whether he took part in any vote; (3) whether he indicated his view regarding any of the defendants, orally or otherwise; and (4) whether his mere presence inhibited any regular juror in any aspect of the deliberation process. *Id.* at 472. The hearing revealed no prejudice to the defendant by the presence of the silent alternate juror and when the hearing results were certified, the Fifth Circuit affirmed its original decision. United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

97. 481 F.2d at 472. The Fifth Circuit had previously decided a civil case with an almost identical fact pattern as that presented in *Allison*. In La-Tex Supply Co. v. Fruehauf Trailer Div., Fruehauf Corp., 444 F.2d 1366 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971), an alternate juror was permitted to retire with the regular jury and was cautioned not to participate unless ordered to do so by the court. Despite the admonition, the alternate juror, at one point in the deliberations, stated, " 'Let's listen to the foreman.' " *Id.* at 1367. The Fifth Circuit, on appeal, refused to reverse the district court's decision, finding that the procedure had been explained to and agreed upon by all parties before the alternate entered the jury room. The court further stated that "[d]espite earnest efforts to inflate it into more serious proportions, we think that the innocuous nature of the remark speaks for itself." *Id.*

98. *See, e.g.*, Henderson v. Lane, 613 F.2d 175 (7th Cir. 1980) (recalling an alternate juror who had been dismissed and sent home and substituting him for a regular juror after 2½ hours of deliberations was not error); United States v. Meinster, 484 F. Supp. 442 (S.D. Fla. 1980), *aff'd in part and rev'd in part on other grounds sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) (allowed substitution of alternate juror after 1½ days of deliberations); United States v. Barone, 83 F.R.D. 565 (S.D. Fla. 1979) (allowed substitution of alternate juror after eight days of deliberations in a six-month, complex criminal trial); *cf.* United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975) (unique procedural posture of substitution of an alternate juror, over the defendant's objection, after the jury had reached a verdict that was rejected by the trial judge as inconsistent with the jury instructions, was found to require reversal in that the mandates of rule 24(c) had not been complied with).

99. *See, e.g.*, Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979); United States v.

tutionality of the alternate juror system itself has repeatedly withstood constitutional attack,[100] the federal courts are apparently of the opinion that deviations from the federal rules can best be analyzed by focusing upon the correct interpretation of those rules.[101]

Independence of Federal and State Jury Procedure

In 1968, the United States Supreme Court, in *Duncan v. Louisiana*,[102] announced that the sixth amendment guarantee of trial by jury[103] was applicable to the states through the due process clause of the fourteenth amendment.[104] The Court did not, however, decide that state jury procedure must conform to federal practice.[105] In fact, the Court did not even contemplate widespread revision of state criminal procedures.[106] It simply imposed upon the states the requirement that the defendant be afforded a trial by jury in serious criminal proceedings.[107] Consequently, states made juries available to defendants who were accused of serious crimes, but they continued to interpret jury

Allison, 481 F.2d 468, 470 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); United States v. Lamb, 529 F.2d 1153, 1156 n.4 (9th Cir. 1975).

100. *See* note 37 *supra* and accompanying text.

101. The United States Supreme Court has exhibited support for the proposition that deviations from the mandates of the rules should be analyzed by focusing on the correct interpretation of the rule itself. *See* Fallen v. United States, 378 U.S. 139 (1964) (stating that the Federal Rules of Criminal Procedure "are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances"). *Id.* at 142.

102. 391 U.S. 145 (1968).

103. *See* note 3 *supra* for the relevant text of the sixth amendment.

104. *See* note 4 *supra* for the relevant text of the fourteenth amendment.

105. Justice Fortas, concurring, made it plain that he did not think such a result should follow merely from the fact that states would be required to afford defendants jury trials.

> There is no reason whatever for us to conclude that . . . we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings.
>
> . . . .
>
> Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. While we may believe . . . that the right of jury trial is fundamental, it does not follow that the particulars of according that right must be uniform. We should be ready to welcome state variations which do not impair—indeed which may advance—the theory and purpose of trial by jury.

Bloom v. Illinois, 391 U.S. 194, 213-15 (Fortas, J., concurring in Duncan v. Louisiana, 391 U.S. 145 (1968)). (Justice Fortas' concurring opinion in *Duncan* also applied to *Bloom*.)

106. 391 U.S. 145, 158 n.30 (1968). The overwhelming majority of states already provided for jury trials that were "equal in breadth" to the sixth amendment. *Id.* at 159.

107. *Id.* at 161-62. The *Duncan* Court held that a trial had to be afforded defendants who were accused of serious crimes but did not define "serious crime." The Court in *Duncan* only held that a defendant who faced a possible incarceration of up to two years was accused of a "serious crime" and was, therefore, constitutionally entitled to a jury trial. *Id.* Subsequently, in Baldwin v. New York, 399 U.S. 66, 69 (1970), the Court defined a "serious crime" as one that carries a maximum penalty exceeding six months' imprisonment. *See generally Neo-Incorporationism*, note 19 *supra*.

procedures according to their own statutes and constitutions.[108] The *Duncan* decision, nevertheless, opened an inevitable floodgate of litigation. By expressly reserving the question of whether state and federal jury procedure must be consistent,[109] the Supreme Court invited federal court scrutiny of all state jury procedures that deviated from federal jury practice.

The first state jury procedural issue to reach the federal courts concerned the numerical composition of the jury. In *Williams v. Florida*,[110] the Florida statute at issue provided for twelve-member juries in all capital cases and six-member juries in all other criminal cases.[111] Before the Florida trial court, the defendant, charged with robbery, filed a pre-trial motion to impanel a twelve-member jury instead of the six-member jury provided in all cases other than capital cases.[112] The motion was denied and the defendant was convicted and sentenced to life imprisonment by a six-member jury.[113] The defendant appealed on the ground that his sixth amendment rights had been violated and the Florida District Court of Appeals affirmed the conviction.[114] The United States Supreme Court granted certiorari[115] and upheld the constitutionality of a six-member jury in a state criminal proceeding.[116] After concluding that the common-law requirement of a twelve-member jury was an historical accident,[117] the Court reasoned that a six-member jury was as capable of performing the jury's function as the traditional twelve-member jury.[118] The purpose of a trial by jury was stated as the prevention of government oppression[119] and, given this purpose, the essential feature of the jury was defined as "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of

108. *See, e.g.*, Hearns v. State, 223 So. 2d 738 (Fla. 1969), *cert. denied*, 399 U.S. 929 (1970) (Florida provision for six-member jury was held constitutional because, although the sixth amendment guarantees the right to trial by jury, it does not specify a required number of jurors). *See also* Williams v. Florida, 399 U.S. 78 (1970).

109. 391 U.S. 157-58 & n.30.

110. 399 U.S. 78 (1970).

111. *Id.* at 79-80 & n.3.

112. *Id.* at 80 & n.3.

113. *Id.* at 80.

114. *Id.* The Florida Supreme Court determined that it was without jurisdiction to entertain a direct appeal from the Florida trial court; thus, the District Court of Appeals was the highest court from which a decision could be had. *Id.* at 80 n.5.

115. 396 U.S. 955 (1969).

116. 399 U.S. at 103.

117. *Id.* at 102.

118. *Id.* at 100.

119. *Id.*

guilt or innocence."[120] The Court concluded that this purpose was not a function of the number of jurors[121] and held the purpose served when the jury was large enough to promote group deliberation without external influence and when the size provided the possibility of obtaining a representative cross-section of the community.[122] Thus, while the Court never expressly declared that state jury procedures need not conform to federal practice,[123] such an inference is permissible because of the twelve-member jury requirement in federal courts.

The constitutionality of less-than-unanimous jury verdicts in state courts was the next procedural dispute subjected to federal court scrutiny. In *Apodaca v. Oregon*,[124] an Oregon constitutional provision permitting less-than-unanimous jury verdicts was at issue.[125] In federal jury trials, unanimity of verdicts had been recognized as an indispensable feature since the late 1800s.[126] Thus, the contention on appeal to the United States Supreme Court was, essentially, that the defendants were denied their constitutional right to trial by jury under the sixth amendment because the Oregon Constitution did not guarantee the same rights as the federal Constitution.[127] Justice Powell, concurring, noted that, although, on the basis of history and precedent, the sixth amendment requires unanimity in federal jury trials,[128] the due process clause of the fourteenth amendment does not impose upon the states all the elements of a jury trial within the meaning of the sixth amend-

120. *Id.*

121. *Id.*

122. *Id. See* note 108 *supra*.

123. The Court concluded its decision with the following statement: "Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." 399 U.S. at 103; *see* notes 21 & 51-52 *supra* and accompanying text. The constitutionality of a jury with less than six members remained dubious until Ballew v. Georgia, 435 U.S. 223 (1978). In *Ballew*, the Court rendered unconstitutional the use of five-member juries in state criminal proceedings. Although the Court did not reach a majority decision, the Justices all agreed that a jury of five was constitutionally insufficient. *Id.* at 245-46. Justice Powell argued that the *Ballew* decision should not be interpreted as requiring state and federal jury practice to be identical and that the approval of six-member state juries did not imply that federal juries would be similarly composed. *Id. See generally Neo-Incorporationism*, *supra* note 19.

124. 406 U.S. 404 (1972).

125. ORE. CONST. art. I, § 11 provides, in part: "[I]n the circuit court ten members of the [twelve-member] jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous [twelve-member jury] verdict, and not otherwise . . . ."

126. *See* Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., concurring in Apodaca v. Oregon, 406 U.S. 404 (1972)); Andres v. United States, 333 U.S. 740, 748-49 (1948); Patton v. United States, 281 U.S. 276, 288-90 (1930); Maxwell v. Dow, 176 U.S. 581, 586 (1900); Thompson v. Utah, 170 U.S. 343, 355 (1898). *See also* FED. R. CRIM. P. 31.

127. 406 U.S. at 406.

128. *Id.* at 369-70 (Powell, J., concurring) (Justice Powell's concurring opinion in *Apodaca* is printed in *Johnson*). *See* note 126 *supra* and accompanying text.

ment.[129] In addition to approving the precedent first expressed in *Williams*,[130] of allowing individual states to regulate their own jury procedure even if contradictory to federal practice, the Supreme Court, by its holding in *Apodaca*, clarified the definition of the purpose of a jury trial: The purpose of a trial by jury[131] is not vitiated when a unanimous verdict cannot be returned by the jury; as long as a majority verdict is rendered in accordance with the state statute or constitution, a defendant has been afforded his constitutional right to trial by jury.[132] Thus, even though the Supreme Court has never expressly stated that state and federal jury practice need not be in conformity, the holdings of *Williams* and *Apodaca* illustrate a resolution by the Court that such conformity is not required and, indeed, is not expected.

That such consistency between state and federal jury practice is neither required nor expected is further illustrated by *Potter v. Perini*.[133] In 1976, the *Potter* case presented a federal court with its first opportunity to review a state court decision which, in effect, allowed an alternate juror to silently participate in the jury deliberation process. In *Potter*, an Ohio trial judge neglected to dismiss the alternate juror, who then retired to the jury room with the jury for forty-five minutes of the deliberations. When this oversight was discovered, the jury was called into court and a hearing was conducted; the alternate juror was instructed not to discuss the deliberations or how she would have voted and was then discharged.[134] The jury subsequently deliberated one hour, returned to the court for additional instructions and later returned a unanimous guilty verdict.[135] Potter's appeal to the Ohio Supreme Court was dismissed on the ground that it presented no sub-

129. 406 U.S. at 369 (Powell, J., concurring). Justice Powell was emphatic in his belief that the fourteenth amendment did not require state and federal jury practices to be uniform: "I do not think that all of the elements of jury trials within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment . . . . [D]ue process does not require that the States apply the federal jury-trial right with all its gloss." *Id. See also* notes 3 & 4 *supra* for relevant text of the sixth and fourteenth amendments, respectively.

130. *See* notes 110-23 *supra* and accompanying text.

131. *See* notes 119-22 *supra* and accompanying text.

132. 406 U.S. at 373-74 (Powell, J., concurring). Even though states may constitutionally employ six-member juries, *see* note 125 *supra*, it was determined in Burch v. Louisiana, 441 U.S. 130 (1979), that states are constitutionally bound to require unanimity of jury verdicts in six-member jury trials.

133. 545 F.2d 1048 (6th Cir. 1976) (per curiam).

134. *Id.* at 1049. Apparently the district court hearing revealed that there was no participation by the alternate in the deliberations, that her presence had no effect on the other jurors and that her presence had not prejudiced the defendant in any way. *Id. See* note 141 *infra*.

135. 545 F.2d at 1049.

stantial constitutional question.[136] The defendant then petitioned for a writ of habeas corpus to the United States District Court for the Northern District of Ohio.[137] The district court granted the petition and held that the presence of an alternate juror in the jury deliberations for any length of time created sufficient grounds for mistrial.[138] The district court judge ordered that Potter be released from custody unless a new trial was granted.[139] On appeal to the United States Court of Appeals for the Sixth Circuit, the district court's order was reversed.[140] The Sixth Circuit was succinct in its reversal: "Federal courts do not exercise supervisory jurisdiction over state trial courts"; the Ohio decision was "grounded upon a procedural issue not related in any manner to the Federal Constitution."[141]

In essence, the Sixth Circuit in *Potter* upheld the precedent set by the Supreme Court in *Williams* and *Apodaca*. The individual states, through the due process clause of the fourteenth amendment, are required to afford defendants in serious state criminal proceedings the right to trial by jury. However, the holdings of the Supreme Court indicate that state jury procedure should be controlled by the state and need not conform to federal jury practice. It was against this background of uncertainty as to the exact role of the alternate juror in the jury deliberation process, and the apparent autonomy granted states in the regulation of jury trial procedure, that the Seventh Circuit faced the issue of the constitutionality of the silent alternate's presence in the deliberation room in *Johnson v. Duckworth*.[142]

136. *Id.* at 1048.

137. Potter appealed his conviction on the grounds that his constitutional rights had been violated by the presence of the alternate juror in the jury room during the deliberations. *Id.* at 1049. *See* note 158 *infra*.

138. 545 F.2d at 1050.

139. *Id.* at 1048. The district court judge relied on United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964) and United States v. Beasley, 464 F.2d 468 (10th Cir. 1972) in overruling the Ohio Supreme Court. *See* notes 49-61 & 74-78 *supra* and note 141 *infra* and accompanying text.

140. 545 F.2d at 1050.

141. *Id.* The court of appeals found that there was no showing of any participation by the alternate, or that the presence of the alternate prejudiced the defendant in any way or had any influence on the deliberations of the jury. The court did state that one of the elements negating any prejudicial influence was the continued deliberations of the jury after discharge of the alternate. *Id.* at 1049. The Sixth Circuit emphasized that the district judge's reliance on *Virginia Erection* and *Beasley* was misplaced because both of those decisions had been subject to the Federal Rules of Criminal Procedure and those rules had no application in state trial courts in the absence of state adoption. It was also pointed out that Ohio courts had reached similar conclusions in other cases under their state constitution. *Id.* at 1050. *Accord* Henderson v. Lane, 613 F.2d 175 (7th Cir. 1980).

142. 650 F.2d 122 (7th Cir. 1981) (per curiam).

JOHNSON V. DUCKWORTH

Facts of the Case and Procedure in the Courts

The defendant, Robert A. Johnson, was charged with first degree murder. In the Criminal Court of Marion County, Indiana, the trial judge instructed the alternate juror to go with the jury to the jury room and to listen to the deliberations. However, the alternate was admonished that he was not to participate unless ordered to do so by the court.[143] The defendant's objection to the trial judge's directive to the alternate juror was overruled and the alternate remained in the jury room for the duration of the deliberations.[144] The defendant did not request an examination of the jurors subsequent to verdict in order to determine any possible prejudice or improper influence.[145] The jury returned a conviction of murder in the second degree and no hearing to determine any improper influence was conducted.[146]

On appeal to the Indiana Supreme Court,[147] Johnson contended that the trial court erred in allowing the alternate juror to retire with the regular jury over his objection to such a procedure.[148] The Indiana

143. Johnson v. State, 267 Ind. 256, 257-58, 261, 369 N.E.2d 623, 624-25 (1977), *cert. denied sub nom.* Johnson v. Indiana, 436 U.S. 948 (1978). The trial court's instructions to the jury included the following statement to the alternate:

> Alternate juror, Harold Lett, you will retire with the jury. But unless, and until, we excuse a juror and you are directed to actively serve, you are not to vote or participate in the deliberations. You should, however, listen, so that should you be called upon to serve, you will have the benefit of the preceding discussions.

Johnson v. Duckworth, 650 F.2d 122, 123 n.1 (7th Cir. 1981) (per curiam).

144. 267 Ind. at 261, 369 N.E.2d at 626.

145. If the defendant had requested an examination of the jurors subsequent to verdict, it is arguable that the Indiana trial court would have allowed the jurors and the alternate to be questioned to determine whether the alternate had participated in any way or whether his mere presence had inhibited or influenced the jury debate in any manner. *See, e.g.*, Gann v. State, 263 Ind. 297, 330 N.E.2d 88 (1975); Frasier v. State, 262 Ind. 59, 312 N.E.2d 77, *cert. denied*, 419 U.S. 1092 (1974); Sparks v. State, 154 Ind. App. 691, 290 N.E.2d 793 (1972). *See also* note 298 *infra* and accompanying text. If such participation or influence had been discovered, the defendant could then argue that he had been prejudiced by the alternate's presence in the jury deliberations and thus, that his constitutional right to trial by the statutorily required number of impartial jurors could have been violated. *See, e.g.*, United States v. Hayutin, 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968), *subsequent appeal sub nom.* Nash v. United States, 414 F.2d 234 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969).

146. 267 Ind. at 257-58, 261, 369 N.E.2d at 624, 626.

147. Johnson v. State, 267 Ind. 256, 369 N.E.2d 623 (1977), *cert. denied sub nom.* Johnson v. Indiana, 436 U.S. 948 (1978).

148. *Id.* at 257, 369 N.E.2d at 624. Johnson raised three other issues on appeal to the Indiana Supreme Court. The first issue alleged hearsay and improper certification of the coroner's report of the death of the decedent. The second ground of appeal contended that a mistrial should have been declared when the jury observed the defendant in handcuffs. The final allegation of error was that the evidence was insufficient to support the verdict. The Indiana Supreme Court declared all three allegations as lacking in merit in affirming the jury's second degree murder conviction. *Id.* at 258-60, 369 N.E.2d at 624-25.

Supreme Court noted that the Indiana Code forbade communication by the jury with any person unless by order of the court.[149] However, the court found that an alternate was in every respect a juror[150] and concluded that, as long as the alternate did not in any way participate in the deliberations or communicate with the regular jurors, he should not be considered as a stranger to the jury or an outsider who should not be permitted to silently observe the jury deliberation process.[151] Accordingly, the court held that the alternate juror may, in the discretion of the trial court, properly retire to the jury room to listen to the deliberations, provided the trial judge clearly instructs the alternate that he is not in any way to participate in the deliberations unless one of the regular jurors is dismissed by the court.[152] Finding that such an instruction was in fact tendered by the trial court judge, the Indiana Supreme Court affirmed the defendant's conviction.[153]

In a well-reasoned dissent,[154] Justice Pivarnik deemed the possibility of prejudice to the defendant so great that there was no way it could be cured other than by outright reversal.[155] The dissenting justice was troubled by the lack of discussion in the majority opinion as to the possibility of prejudice.[156] He further argued that even if the majority

149. IND. CODE ANN. § 35-1-37-4 (Burns) (1976) provides:

> After hearing the charge, the jury may either decide in court or retire for deliberation. They may retire under the charge of an officer, who must be sworn by the clerk to keep them together in some private and convenient place, and furnish them food as directed by the court, and not permit any person to speak or communicate with them, not do so himself unless by order of the court, or to ask them whether they have agreed upon their verdict, and return them into court, when so agreed, or when ordered by the court. The officer shall not communicate to any person the state of their deliberations; and if he does he shall be punished as for a contempt, and shall not be further employed as a bailiff in such court.

If there are unauthorized communications with the jury by any person, including a silent alternate sitting in on the deliberation process, and prejudice to the defendant can be found therefrom, it is arguable that the court may order that a new trial should be conducted. *See, e.g.*, Gann v. State, 263 Ind. 297, 330 N.E.2d 88 (1975); Sparks v. State, 154 Ind. App. 691, 290 N.E.2d 793 (1972).

150. The court cited Turczi v. State, 261 Ind. 273, 301 N.E.2d 752 (1973), for the proposition that an alternate is in every respect a juror. 267 Ind. at 260, 369 N.E.2d at 625. In *Turczi*, the Indiana Supreme Court defined a juror as a "person who is sworn or affirmed to serve on a jury" and concluded that an alternate is such a person. 261 Ind. at 275, 301 N.E.2d at 753. *Turczi*, however, appears to stand for the proposition that because an alternate juror has taken the same oath as the regular jurors and performed all the functions of regular jurors, except the final deliberations, that an alternate, like a regular juror, may not impeach the jury verdict. *Id.*

151. 267 Ind. at 260, 369 N.E.2d at 625.

152. *Id.*

153. *Id.* *See* note 143 *supra*.

154. 267 Ind. at 260, 369 N.E.2d at 625 (Pivarnik, J., dissenting; Hunter, J., concurring with the dissent as to the alternate juror issue only).

155. *Id.* at 264-65, 369 N.E.2d at 628 (Pivarnik, J., dissenting).

156. "I am aware of no authority which has simply held, as does the majority in this case, that the presence of an alternate in the jury room was proper and without the possibility of prejudice." *Id.* at 264, 369 N.E.2d at 627 (Pivarnik, J., dissenting).

would consent to a hearing to determine any possible prejudice, such a hearing would be impractical, inadequate, against public policy and, in and of itself, an invasion of the privacy and confidentiality of the jury deliberation process.[157]

Upon the Indiana Supreme Court's refusal to declare a mistrial, defendant brought a petition for writ of habeas corpus[158] in the United States District Court for the Southern District of Indiana, claiming violation of his constitutional right to trial by jury under the sixth and fourteenth amendments. The district court dismissed the petition and Johnson appealed.

The Seventh Circuit's Holding

On appeal, the Seventh Circuit unanimously affirmed the district court's dismissal of Johnson's petition for writ of habeas corpus.[159] The Seventh Circuit initially made the crucial distinction that it is the right to trial by jury that the Constitution guarantees, not the right to jury privacy.[160] Jury privacy is merely a means to reach the constitutional end of trial by jury and, within limits, is one proper mode of maintaining the integrity of jury trials.[161] Accordingly, the court focused on the interrelation between the alternate juror system and the purposes of a jury trial[162] to determine whether the privacy of the jury deliberations was so essential to the "substance of the jury trial guarantee"[163] that an error of constitutional dimension had been committed by allowing the alternate to silently observe such deliberations.[164] The privacy of the

157. *Id.* at 260, 369 N.E.2d at 68 (Pivarnik, J., dissenting).

158. 28 U.S.C. § 2254(a) (1976) provides:

> The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution, laws or treaties of the United States.

Johnson contended that his constitutional rights under the sixth and fourteenth amendments had been violated by the alternate's presence in the jury room during the deliberations. 650 F.2d at 123. In addition, Johnson had exhausted his state remedies as required by 28 U.S.C. § 2254(b) (1976). 650 F.2d at 123 n.2.

159. Johnson v. Duckworth, 650 F.2d 122 (7th Cir. 1981) (per curiam).

160. *Id.* at 125 n.7.

161. *Id.* at 125. The court stated that, in fact, jury privacy must be breached in certain circumstances in order to protect the defendant's constitutional right to trial by jury. For instance, the privacy of the jury must be invaded where there is evidence that a juror's vote was "predicated upon a bribe rather than upon a conscientious evaluation of the evidence." *Id.* at 125 (citing Clark v. United States, 289 U.S. 1, 14 (1933)).

162. *See* notes 119-22 *supra* and accompanying text.

163. Burch v. Louisiana, 441 U.S. 130, 138 (1979). *See* note 132 *supra*.

164. 650 F.2d at 124. The Seventh Circuit examined a brief history of jury system composition mandated by the United States Supreme Court. It acknowledged the right to trial by jury in serious criminal proceedings, that such rights did not constitutionally demand a twelve-member jury, and that the unanimous verdict of a twelve-member jury was not required if a state statute or

jury deliberation process was not found to be such a substantive component of the right to trial by jury that the silent observance of an alternate juror, who possessed all the requisite qualifications of a regular juror, deprived the defendant of this constitutional right.[165]

The Seventh Circuit noted Johnson's reliance on such cases as *United States v. Virginia Erection Corp.*,[166] *United States v. Beasley*,[167] and *United States v. Chatman*,[168] where the federal courts held the presence of an alternate juror during deliberations to constitute *per se*[169] reversible error.[170] The court noted that the primary basis for these decisions was Federal Rule of Criminal Procedure 24(c), which requires dismissal of the alternate jurors when the jury retires to deliberate.[171] However, the federal rules are not binding upon the states in the absence of state adoption[172] and Indiana has not adopted the Federal Rules of Criminal Procedure. Nevertheless, the Seventh Circuit did consider dicta in these opinions to the effect that the alternate's presence "might" have affected the verdict and may have breached the privacy of the jury room deliberations.[173] Although acquiescing in the need for privacy and secrecy of the jury deliberations in order to promote uninhibited debate and independence of thought,[174] the Seventh Circuit distinguished the alternate juror from other outsiders who may be seen as hampering such freedom of expression.[175] In rejecting defendant's reliance on *People v. Knapp*,[176] the court held that, unlike the situation presented in *Knapp* where an officer of the court was present,[177] the invasion of the jury deliberation process here was not by one

constitution called for only a majority verdict. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968). The court of appeals also acquiesced in the constitutional mandate of a jury comprised of at least six members and the requirement of a unanimous verdict from juries so composed. *See* Burch v. Louisiana, 441 U.S. 130 (1979); Ballew v. Georgia, 435 U.S. 223 (1973). The Seventh Circuit determined that these Supreme Court decisions were based on the fundamental right to trial by jury and the substantive components of that right. The Seventh Circuit then examined the issue of the silent alternate's presence in the deliberation room within the same context. 650 F.2d at 125.

165. 650 F.2d at 126.

166. 335 F.2d 868 (4th Cir. 1964); *see* notes 49-61 *supra* and accompanying text.

167. 464 F.2d 468 (10th Cir. 1972); *see* notes 74-78 *supra* and accompanying text.

168. 584 F.2d 1358 (4th Cir. 1978); *see* notes 79-82 *supra* and accompanying text.

169. *See* note 76 *supra*.

170. 650 F.2d at 124.

171. *Id. See* note 52 *supra*.

172. *See, e.g.*, Potter v. Perini, 545 F.2d 1048 (6th Cir. 1976) (per curiam). *See* notes 133-41 *supra* and accompanying text for a discussion of *Potter*.

173. 650 F.2d at 124.

174. *Id.* (citing Clark v. United States, 289 U.S. 1, 13 (1933)).

175. 650 F.2d at 125.

176. 42 Mich. 267, 3 N.W. 927 (1879).

177. *See* notes 25-30 *supra* and accompanying text.

who may have had ulterior motives or who may have been prejudiced or biased toward one of the parties.[178] In the present case, the alternate had gone through all of the formalities necessarily required of a regular juror and there was no reason to expect that he would favor conviction any more than he would favor acquittal.[179]

Finally, the Seventh Circuit found the policy considerations underlying Indiana's requirement of the alternate's presence at the jury deliberations to be of special significance.[180] The court noted that the role of the alternate juror was to replace a regular juror who became ill or incapacitated. While this role was indubitably served if substitution was required before retirement, it was questionable whether the same procedure would be as effective if substitution was required after the deliberations had commenced because the alternate would be completely ignorant of prior discussions if he had been barred from listening to the deliberations.[181] The solution by the Indiana trial court obviated this dilemma because the alternate would be in the jury room and thus would be fully apprised of all arguments made prior to substitution.[182] In addition to the remedial nature of the procedure, the court found the practical effects as outweighing any of the alternative procedures typically employed by the courts.[183] The court focused on the three alternatives commonly used. The first option would retain the alternate "on call" so that, should a deliberating juror become unable to complete the process, the alternate could then be substituted. How-

178. 650 F.2d at 125 (citing People v. Knapp, 42 Mich. 267, 268-69, 3 N.W. 927, 929-30 (1879)).

179. 650 F.2d at 125. The alternate juror had been subject to the same voir dire examination in which he affirmed, under oath, that he had no prejudices or biases toward either party. The alternate had been subject to peremptory challenge and, when not eliminated by this procedure, had been exposed to exactly the same case that the regular jurors had been exposed to. The alternate, as part of the jury hearing the trial, had been instructed to disregard improper testimony; offers of proof and arguments as to admissibility of evidence had been submitted outside the presence of both regular and alternate jurors. If the regular jury had been sequestered, the alternate would have been sequestered along with the regular jurors. The attorneys' closing arguments and the instructions on the law are given to regular and alternate jurors alike. Thus, the alternate who accompanies the jury into deliberations is no more biased or prejudiced than any regular juror and has no more information from which to draw on to arrive at a verdict than that possessed by the regular jurors. *Id.* The Seventh Circuit did disagree with the Indiana Supreme Court's determination that the alternate was not a stranger to the jury and therefore did not invade the jury's privacy. *Id.* at 125 n.7. The Seventh Circuit noted that the very fact that the alternate was not allowed to participate and vote made him a stranger to the jury deliberations. Nonetheless, the court focused upon the "particular encroachment" of the jury's privacy and found that, because of the identical treatment of alternate and regular jurors, this encroachment was not one that deprived the defendant of his constitutional right to trial by jury. *Id.* at 125.

180. *Id.* at 126.

181. *Id.*

182. *Id.*

183. *Id.*

ever, in order for the alternate to be fully apprised of the prior discussions, the remaining jurors would either have to capsulize the prior debate or begin deliberations anew with the substituted alternate.[184] The problem with this procedure was that the alternate's vote could easily be influenced if the remaining jurors had already arrived at a verdict and there was the risk that his vote may be based on a less-than-thorough examination and discussion of the evidence.[185] The second procedure would simply permit the remaining jurors to decide the case. The court noted, however, that the constitutionality of this option could not be definitely ascertained where a jury had only six members to begin with.[186] In addition, the court stated a preference for compliance with a legislatively determined jury size.[187] The final alternative would be to declare a mistrial. Focusing on the defendant, the court explained the devastating effect of such a result on a defendant who may have depleted his resources to pay his retained attorney. The defendant consequently may be forced to repeat the entire proceeding with a court-appointed attorney unfamiliar with the case.[188] In conclusion, the Seventh Circuit found that, although the Indiana procedure may not have been perfect, it was preferable to the alternatives and, in any event, could not be held to have deprived Johnson of his constitutional right to trial by jury.[189]

Analysis of the Opinion

In upholding the Indiana Supreme Court's decision, the Seventh Circuit complied with the United States Supreme Court decisions which allowed individual states to adopt jury procedures in accordance with their respective needs, even though these procedures might not comport with federal court procedures.[190] In *Duncan v. Louisiana*,[191] the Supreme Court decided that the due process clause of the fourteenth amendment incorporates the right to trial by jury guarantee of the sixth amendment and thus is applicable to the individual states.[192] However, the Court did not decide whether state jury procedure must

184. *Id.*
185. *Id.*
186. *Id.* at 126 & n.10. *See* note 123 *supra* and notes 273-79 *infra* and accompanying text.
187. *Id.* at 126.
188. *Id.*
189. *Id.*
190. *See generally* notes 102-42 *supra* and accompanying text for a discussion of the independence of federal and state jury procedure.
191. 391 U.S. 145 (1968).
192. *Id.* at 149.

conform to federal jury practice.[193] That issue was decided by the Court in *Williams v. Florida*,[194] and upheld in *Apodaca v. Oregon*,[195] when the Court gave its constitutional "seal of approval" to state jury procedures that were inconsistent with jury procedures in the federal system.[196]

Justice Powell, in *Ballew v. Georgia*,[197] and Justice Fortas, in *Duncan v. Louisiana*,[198] made it clear that state and federal jury practice are not required to be identical and that states should be allowed the greatest latitude in developing jury variations, as long as they do not impair the theory or purpose of the jury trial within the meaning of the federal Constitution.[199] The fact that many states already assume this autonomy as to jury procedural issues is illustrated by the number of jurisdictions relying on only their own laws and decisions for their determination of the consequences of an alternate's presence in the jury room during deliberations.[200] Thus, the Seventh Circuit carried out the stated preferences of the Supreme Court by its initial determination that Indiana was free to implement its own jury procedural rules.[201]

193. *Id.* at 158 n.30.

194. 399 U.S. 78 (1970). *See* notes 110-23 *supra* and accompanying text.

195. 406 U.S. 404 (1972). *See* notes 124-32 *supra* and accompanying text.

196. *See* Apodaca v. Oregon, 406 U.S. 404, 407-11, 414 (1971). That the Supreme Court has shown a favorable inclination toward allowing states to employ jury procedures which are not sanctioned in the federal system is also illustrated in Ludwig v. Massachusetts, 427 U.S. 618 (1976). In *Ludwig*, the Court held that the use of a two-tiered trial system by a state was constitutional, even though such a procedure was not allowed in the federal court system. *Id.* at 629-30. The Court stated that "[t]he modes of exercising federal constitutional rights have traditionally been left, within limits, to state specification." *Id.* at 630. *See also* Duncan v. Tennessee, 405 U.S. 127 (1972) (per curiam) (establishing different double jeopardy standards in federal and state courts); Potter v. Perini, 545 F.2d 1048 (6th Cir. 1976) (per curiam). *Contra*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (when the United States Supreme Court held the sixth amendment right to trial by jury applicable to the states, the affirmative duty to provide a cross-representative jury venire, previously required only in the federal courts, also became applicable to the states). *See generally* Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 FORDHAM L. REV. 215 (1975); Comment, *Due Process and Jury Trials in State Courts*, 10 ARIZ. L. REV. 492 (1968).

197. 435 U.S. 223, 245-46 (1978) (Powell, J., concurring).

198. 391 U.S. 145, 211-16 (1968) (Fortas, J., concurring).

199. *See* notes 105, 119-22, 123 & 129 *supra* and accompanying text.

200. *See, e.g.*, Potter v. Perini, 545 F.2d 1048 (6th Cir. 1976) (the Sixth Circuit, dismissing the defendant's petition for writ of habeas corpus, relied on Ohio law only in holding that where the presence of the alternate juror caused no prejudice to the defendant, no reversal was required); Bullock v. State, 150 Ga. App. 824, 258 S.E.2d 610 (1979) (Georgia Supreme Court cited only Georgia case law for holding reversible error where an alternate juror was allowed to retire with the regular jury over the defendant's objection); Vander Veer v. Toyota Motor Distrib., Inc., 282 Or. 135, 577 P.2d 1343 (1978) (relying only on an Oregon statute requiring dismissal of the alternate when the jury retires to deliberate, the Oregon Supreme Court found reversible error when two alternates accompanied regular jurors to the jury room and voted on the issue of liability in a civil case). *See also* Johnson v. State, 267 Ind. 256, 369 N.E.2d 623 (1977), *cert. denied sub nom.* Johnson v. Indiana, 436 U.S. 948 (1978).

201. The Seventh Circuit was required to determine, at the outset, that Indiana was free to

The question remaining to be answered was whether the Indiana procedure in any way deprived Johnson of his right, under the United States Constitution, to trial by jury.

The Constitutional Right to Trial by Jury vs. the Right to Jury Privacy

In examining the constitutionality of the alternate's silent observance of the jury deliberation process, the Seventh Circuit distinguished the right to trial by jury from the right to jury privacy.[202] The right to trial by jury, being the constitutional end to be protected, is absolute and cannot be taken away or infringed upon by the individual states. Thus, in all serious criminal prosecutions, states must afford defendants a trial by jury as provided in the Constitution and defined by the United States Supreme Court.[203]

Jury privacy, on the other hand, is neither guaranteed by the Constitution nor granted by the United States Supreme Court. It is, however, one means of ensuring the integrity of the jury trial.[204] Thus, jury privacy is not absolute but may be modified by a state in order to promote the efficiency and effectiveness of the protected right for the benefit of the defendant, the prosecution, the defense and the general public.[205] Nevertheless, modifications of jury privacy by a state must still be circumscribed to ensure that the purpose of the jury trial is not impaired[206] and that the jury's ability to deliberate is not interfered with.[207] Accordingly, the Seventh Circuit examined United States Supreme Court decisions ruling on issues of jury procedure[208] and

devise its own jury procedural rules. The lack of discussion by the Seventh Circuit as to the ability of Indiana to implement this procedure indicates the federal court's willingness to defer to state jury procedural autonomy. If such a determination had not been implicitly made, the arguable result would have been the prompt invalidation of the Indiana procedure as contrary to Federal Rules of Criminal Procedure 23(b) and 24(c), *see* notes 51-52 *supra*, because, if states were not free to implement their own jury procedures, they would, under the fourteenth amendment, be bound by the federal rules.

202. 650 F.2d at 125 n.7. "[T]he constitutional right at stake is the jury trial, not jury privacy." *Id.*

203. *See* Burch v. Louisiana, 441 U.S. 130 (1979); Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970); Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968). *See also* notes 2, 3 & 4 *supra*.

204. *See generally* Clark v. United States, 289 U.S. 1 (1933).

205. *See* note 161 *supra*.

206. *See* notes 119-22 *supra* and accompanying text for a discussion of the purpose of a jury trial. *See generally* Burch v. Louisiana, 441 U.S. 130 (1979); Apodaca v. Oregon, 406 U.S. 404 (1972).

207. *See* Ballew v. Georgia, 435 U.S. 223, 239 (1978).

208. *See* Burch v. Louisiana, 441 U.S. 130 (1979); Ballew v. Georgia, 435 U.S. 223 (1978); Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

adopted the criteria used by the Court in such cases[209] to determine the constitutionality of the procedure utilized in Indiana.[210] These criteria[211] are based on the fundamental right to trial by jury and the substantive components of that right.[212] The Seventh Circuit defined jury privacy as a "substantive component" of the right to trial by jury and thus perceived the relevant inquiry to be whether the alternate's presence was such an intrusion upon that privacy component that it impaired the fundamental purpose of the jury trial by inhibiting the jury's ability to function.[213]

The Particular Encroachment

In determining that the jury's ability to function had not been impaired, the Seventh Circuit examined the type of invasion that had occurred in the Indiana trial court: An alternate juror had been permitted to retire with the regular jury to the jury room to participate silently in the deliberation process.[214] The court stated that this type of invasion did not pose the same threat that the presence of any other outsider to the jury deliberations would pose.[215] The alternate juror had been through the same voir dire process and had been exposed to the same evidence as the regular jurors; thus, there was no basis upon which to conclude that he was not as open-minded or neutral as the regular jurors or would inhibit the jury's ability to debate.[216] In fact, in contrast to other outsiders or officers of the court, with whom the jury has no, or at most, limited contact,[217] it is probable that the regular jury is even comfortable with the alternate juror. The alternate has been with the regular jury for the duration of the trial; they have eaten together, have probably made small conversation and gotten to know one another, and, if sequestered, have been sequestered together.[218] Thus,

209. The relevant criteria, as propounded by the Supreme Court, involved determinations such as whether the feature at issue presented a "threat to the preservation of the substance of the jury trial guarantee," Burch v. Louisiana, 441 U.S. 130, 138 (1979); whether the procedure impaired, to a constitutional degree, the jury's ability to function; whether the procedure defeated those axioms critical to the preservation of liberty; and whether it was fundamentally fair to allow such a procedure. *See* Ballew v. Georgia, 435 U.S. 223 (1978); Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

210. 650 F.2d at 124.

211. *See* note 209 *supra* and accompanying text.

212. *See generally* the cases cited in notes 208-09 *supra*.

213. 650 F.2d at 125.

214. *Id.*

215. *See generally* notes 26-29 *supra* and accompanying text.

216. *See* note 179 *supra* and accompanying text.

217. *See, e.g.*, People v. Knapp, 42 Mich. 267, 3 N.W. 927 (1879).

218. In fact, in those states that employ the additional or eliminated juror system, the juror

this particular encroachment should not be viewed as one which the jury would feel inhibited by or uncomfortable with since they are familiar with the alternate and are accustomed to his presence.

In determining that the mere presence of the alternate juror did not result in a constitutionally impermissible invasion of jury privacy, it is interesting to note that the Seventh Circuit did not consider the often-raised issue that the facial expressions and gestures of the alternate might have such a profound impact upon the deliberating jury that they would be inhibited or influenced by such physical manifestations.[219] Perhaps this omission was from the honest belief that these physical gestures could not truly have so profoundly affected the jury that their ability to deliberate would have been hampered. On the other hand, reference to these gestures may have been omitted so as not to imply serious question of the jury's integrity. One of the basic premises upon which our entire system of trial by jury functions is the "rule" that juries can be trusted to comply with the trial judge's instructions.[220] If the alternate juror had been instructed not to participate, it is arguable that the Seventh Circuit, due to the absence of any evidence illustrating such participation, simply assumed that the jurors all complied with this instruction. Even though these reasons are viable explanations for the lack of discussion of this oft-mentioned issue, perhaps the main reason was that the defendant simply did not request a hearing to determine whether such incidents actually occurred.[221] In the absence of a request to determine whether prejudice actually occurred, the court will normally only presume prejudice if there is evidence of juror misconduct.[222] Since no evidence was presented upon which to

ultimately chosen as the alternate has, until the conclusion of the trial and just prior to the deliberations, been one of the actual jurors. *See* notes 33-36 & 179 *supra* and accompanying text.

219. *See, e.g.*, United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

220. *See* Parker v. Randolph, 442 U.S. 62, 75 n.7 (1979). *See also* Johnson v. Louisiana, 406 U.S. 356 (1972) (Powell, J., concurring in Apodaca v. Oregon, 406 U.S. 404 (1972)). In concurring in *Apodaca*, Justice Powell noted that our "historic dedication to jury trial" is based upon the conviction that "each juror will faithfully perform his assigned duty." *Id.* at 379. *See generally* United States v. Lamb, 529 F.2d 1153, 1160 (9th Cir. 1975) (Wright, J., and Trask, J., dissenting).

221. While this issue appears to have been raised in the Indiana Supreme Court, Johnson v. State, 267 Ind. 256, 261, 369 N.E.2d 623, 626 (1977), *cert. denied sub nom.* Johnson v. Indiana, 436 U.S. 948 (1978) (Pivarnik, J., dissenting), there is no indication in the Seventh Circuit's opinion that the defendant made this argument on appeal in the federal courts. *See* Johnson v. Duckworth, 650 F.2d 122 (7th Cir. 1981) (per curiam). In any event, the defendant did not request a hearing to determine any possible prejudice and, thus, could not argue on appeal that he had been prejudiced by the silent alternate's presence. *See* notes 145-46 *supra* and accompanying text; *see also* note 300 *infra*.

222. *See* Bowman v. State, 207 Ind. 358, 192 N.E. 755 (1934); Hutchins v. State, 151 Ind. 667, 52 N.E. 403 (1898). *See generally* Remmer v. United States, 347 U.S. 227 (1954).

base a finding of juror misconduct, or participation by the alternate, the Seventh Circuit concluded that there was nothing inherent in this particular type of invasion that would have influenced the jury or inhibited its ability to debate.[223]

In determining that the jury's ability to function had in no way been impaired by the silent presence of the alternate juror, the Seventh Circuit appeared to be departing dramatically from the traditional belief in the absolute privacy of the deliberation process.[224] However, at common law, there was no alternate juror system;[225] thus, *any* invasion of the jury's privacy necessarily constituted an invasion by an "outsider" because no one else had been with the jury throughout the entire trial proceedings or had been subjected to the same selection process.[226] Accordingly, by the time the alternate juror system was conceived, the element of absolute privacy was deeply imbedded in the theory of trial by jury.[227] Furthermore, this theory of strict privacy was arguably applied to the alternate juror system automatically, without much thought being given to the fact that the alternate was not the typical outsider that the rule had been devised to protect against. In fact, the American Bar Association notes that the procedure of allowing an alternate to silently observe jury deliberations is often rejected simply because the legislatures did not contemplate such use of alternate jurors when statutes regulating their conduct were enacted.[228] Nevertheless, the historical prevalence of a procedure should not prevent states from modernizing that procedure to enhance its practicality and efficiency.[229]

A Sound Public Policy

It is in defending Indiana's attempts to modernize the alternate juror system and to increase the system's efficiency that the Seventh

223. 650 F.2d at 125.

224. *See, e.g.*, United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964); Rickard v. State, 74 Ind. 275 (1881); People v. Knapp, 42 Mich. 267, 3 N.W. 927 (1879). *See also* notes 25-30 & 49-61 *supra* and accompanying text.

225. *See* notes 31-32 *supra* and accompanying text.

226. *See* notes 31-32 *supra* and accompanying text. *See generally Alternate Juror Note*, *supra* note 12, at 738.

227. *See generally* notes 25 & 38-45 *supra* and accompanying text.

228. *See* ABA STANDARDS, *supra* note 9, § 2.6 at 75.

229. *See, e.g.*, Paisley, *supra* note 12, at 1044. *See also* Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421 (N.D. Ind. 1979). In *Hines*, the court emphasized that both federal and state courts have expressly held that reasonable changes in procedure surrounding the right to trial by jury are constitutionally permissible and that, except as forbidden by constitutional provision, states have the power to change the rules of common law, no matter how deeply they may be imbedded. *Id.* at 427 (citing Manley v. State, 196 Ind. 529, 149 N.E. 51 (1925)).

Circuit's most compelling arguments are found.[230] Since its inception, the purpose of the alternate juror system has been to provide a substitute, should one of the regular jurors become ill or incapacitated, so as to prevent the multitude of mistrials experienced at common law.[231] The system, as it presently exists in the majority of states, and in the federal system, is, nevertheless, inadequate to accomplish the intended purpose because there are only two types of substitution typically allowed.[232] The first type permits substitution only before the deliberations process begins. By allowing only this type of substitution, the federal system and the states are, in effect, defeating the entire purpose of the alternate juror system. If, after having gone through the entire trial and having commenced deliberations, one of the deliberating jurors becomes ill or unable to continue, and the defendant refuses to stipulate to the remaining jurors rendering a verdict,[233] a mistrial must be declared.[234]

Recognizing this inefficient result, some states have adopted the second type of substitution procedure whereby the alternate jurors are retained but isolated from the deliberating jurors. Under this procedure, if a deliberating juror becomes ill or unable to continue, an alternate would still be present who could join the deliberations if the defendant refused to consent to a lesser-numbered jury.[235] This system, however, is not without fault either.

In *United States v. Lamb*,[236] the Ninth Circuit, construing Federal Rule of Criminal Procedure 24(c), raised some very strong policy arguments against allowing substitution of an isolated juror after deliberations have begun. First, the coercive effect upon an alternate who has not had the benefit of prior debate could be substantial if the remaining jurors have already decided on a verdict. Second, if a regular juror

230. 650 F.2d at 126.

231. *See generally* notes 23 & 31-36 *supra* and accompanying text.

232. *See* notes 32-36 *supra* and accompanying text.

233. *See* note 50 *supra* and notes 272-79 *infra* and accompanying text.

234. The insufficiency of this type of substitution has been clearly recognized by state and federal courts as well as by commentators. *See, e.g.*, Henderson v. Lane, 613 F.2d 175 (7th Cir. 1980); United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978); Potter v. Perini, 545 F.2d 1048 (6th Cir. 1976); United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); United States v. Hayutin, 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968), *subsequent appeal sub nom.* Nash v. United States, 414 F.2d 234 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969); Leser v. United States, 358 F.2d 313 (9th Cir.), *cert. dismissed*, 385 U.S. 802 (1966); United States v. Meinster, 484 F. Supp. 442 (S.D. Fla. 1980), *aff'd in part and rev'd in part on other grounds sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981); United States v. Barone, 83 F.R.D. 565 (S.D. Fla. 1979); People v. Valles, 24 Cal. 3d 121, 15 Cal. Rptr. 543, 593 P.2d 240 (1979); Paisley, *supra* note 12, at 1044.

235. *See* notes 40 & 62-72 *supra* and accompanying text.

236. 529 F.2d 1153 (9th Cir. 1975).

could not condone the vote of the other jurors, this juror might be under personal or emotional pressure to feign illness so that the alternate would then be placed in the position of making the choice.[237] Furthermore, if the alternate juror were substituted after any length of deliberations, the other jurors would have to summarize the foregoing debate or begin deliberations anew, resulting in the distinct risk that the alternate would be voting upon a less-than-thorough examination of the case.[238]

While it may be argued that allowing the alternate juror to silently observe the deliberation process would not eliminate these detrimental effects, that is not always the case and there are advantages presented by this procedure that are absent from the "isolation until substitution" procedure. For example, the possibility that the alternate would be voting on a less-than-thorough examination of the case is eliminated. The alternate's silent presence for the duration of the deliberation process ensures that he has been fully apprised of all aspects of the case as discussed by the regular jurors and that his vote, should he be substituted, will be based on a complete analysis of those discussions. One might argue that the requirement that jurors begin deliberations anew, if an alternate is substituted after deliberations have commenced, would accomplish the same result.[239] However, there remains the possibility that not all previous discussions would be remembered and raised and, even if raised, the remaining regular jurors may feel a very cursory discussion is sufficient to fully apprise the "new" juror. In contrast, the silent alternate, by his mere presence, has absorbed all prior discussions and, if required to replace a regular juror, will be able to fully and intelligently discuss all previous deliberations in addition to raising items that the remaining jury may feel are unimportant or have already been decided. Furthermore, the coercive effect on the substituted juror if the regular jurors have already decided on a verdict could

237. *Id.* at 1156. In such a situation, the defendant may be deprived of an opportunity for a hung-jury mistrial if a unanimous verdict is required in that particular jurisdiction. *Id.*

238. *Id. See* Johnson v. Duckworth, 650 F.2d 122, 126 (7th Cir. 1981) (per curiam). *See also* Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43 (1962). In fact, this very procedure was declared unconstitutional in the State of New York. *See* People v. Ryan, 19 N.Y.2d 100, 278 N.Y.S.2d 199, 224 N.E.2d 710 (1966). However, New York has subsequently provided that substitution after deliberations have commenced will be allowed where the defendant specifically consents in writing to such substitution. *See* N.Y. CRIM. PROC. LAW § 270.35 (11A McKinney) (Supp. 1981).

239. *See, e.g.*, United States v. Meinster, 484 F. Supp. 442 (S.D. Fla. 1980), *aff'd in part and rev'd in part on other grounds sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981); United States v. Barone, 83 F.R.D. 565 (S.D. Fla. 1979); People v. Valles, 24 Cal. 3d 121, 154 Cal. Rptr. 543, 593 P.2d 240 (1979); People v. Collins, 17 Cal. 3d 687, 131 Cal. Rptr. 782, 552 P.2d 742 (1976), *cert. denied*, 429 U.S. 1077 (1977).

be less ominous if the alternate were allowed to at least hear the previous debate. While a substituted juror who has not had the benefit of prior discussions would be ignorant of all the reasons for the established verdict, the observant alternate is knowledgeable of every one of these reasons. In anticipation of possible substitution, the silent alternate could conceivably formulate arguments for or against the decided verdict and, if substituted, may even suggest new ways of examining evidence and information that were perhaps overlooked by the previously deliberating jury. Finally, the concern that a regular juror who could not condone the verdict might feign illness to be excused from the stressful situation raises the question of whether such a juror should be allowed to deliberate and vote at all. If such a juror is unable to emotionally detach him or herself from the situation in order to objectively determine the innocence or guilt of the defendant based upon the law and the trial judge's instructions, perhaps the best possible procedure is to remove that juror from the process and to allow the fully apprised alternate to take his or her place.[240]

An Evolutionary Trend Toward the Silent Alternate Juror Procedure

From the previous discussion, it has become apparent that allowing an alternate juror to silently participate in the deliberation process is not unconstitutional and, in fact, is perhaps the best possible means of ensuring a jury trial with the legislatively preferred number of jurors. In considering why this procedure has not been met with overwhelming approval, it must be remembered that "lawyers and judges are prone to look askance at proposals for procedural changes and to resist innovations,"[241] particularly when there is proposed tampering with such constitutional safeguards as the right to trial by jury.[242] However, even this admitted resistance to change cannot overlook the evolutionary trend toward adoption of this very procedure. The development of the alternate juror system in California is particularly illustrative of this trend.

Prior to 1935, substitution of alternate jurors in California was authorized only in the event of death or illness of a regular juror and then, only before final submission of the case to the jury.[243] In 1935,

240. *See generally* United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975).
241. Paisley, *supra* note 12, at 1044.
242. *Id.*
243. *See* People v. Collins, 17 Cal. 3d 687, 131 Cal. Rptr. 782, 552 P.2d 742 (1976), *cert. denied*, 429 U.S. 1077 (1977); People v. Peete, 54 Cal. App. 333, 202 P. 51 (1921); *Alternate Juror Note*, *supra* note 12, at 736 n.2.

however, the substitution of an alternate for a regular juror after several hours of deliberations was upheld on the basis of the California Penal Code.[244] Interestingly enough, in that same year *People v. Britton*[245] held that the California Penal Code, though allowing substitution after deliberations had commenced, did not authorize the California Supreme Court to allow the alternate to be present, even silently and with the defendant's consent, during the entire deliberation process.[246] Nevertheless, the California Supreme Court, in the interest of jury efficiency and effectiveness, eventually determined that the presence of an alternate juror in the jury room during the deliberations is not necessarily detrimental to the defendant's constitutional right to trial by jury and that defense counsel may stipulate to such a procedure.[247] While not expressly overruling *Britton*,[248] *People v. Valles*[249] presents California law as of 1979, holding that, as long as the alternate juror is instructed that he is not to participate in the deliberations unless he is required by the court to replace one of the deliberating jurors, his silent presence in the jury room is not a deprivation of the defendant's right to trial by jury. However, if the instruction is disobeyed, prejudice to the defendant will be presumed unless there is evidence to the contrary.[250] Thus, California law exhibits a constitutional modernization of the alternate juror system, similar to that in Indiana, which enhances the effectiveness and efficiency of this system.[251]

244. *See* People v. VonBadenthal, 8 Cal. App. 2d 404, 48 P.2d 82 (1935); CAL. PENAL CODE § 1089 (Deering) (1937); note 40 *supra* and accompanying text.

245. 4 Cal. 2d 622, 52 P.2d 217 (1935).

246. *Id. See* note 40 *supra* and accompanying text for a discussion of *Britton*.

247. *See* People v. Valles, 24 Cal. 3d 121, 154 Cal. Rptr. 543, 593 P.2d 240 (1979).

248. The California Supreme Court felt that it need not expressly overrule People v. Britton, 4 Cal. 2d 622, 52 P.2d 217 (1935), because *Britton* did not present a case where counsel had stipulated to the presence of the alternate juror in the deliberation room. Nevertheless, it should be noted that the court in *Britton* adopted in full the holding of People v. Bruneman, 4 Cal. App. 2d 75, 40 P.2d 891 (1935), where such consent by counsel to the alternate's silent presence had been obtained. Thus, it can effectively be argued that for all practical purposes *Britton* has been overruled. *See* note 40 *supra* and accompanying text for a discussion of *Britton* and *Bruneman*.

249. 24 Cal. 3d 121, 154 Cal. Rptr. 543, 593 P.2d 240 (1979).

250. *Id.* at 122, 124, 154 Cal. Rptr. at 545, 547, 593 P.2d at 242, 244. *Cf.* United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974) (holding that sufficient prejudice for reversal will be shown only if the alternate in any way participates in the jury deliberations).

251. The Indiana alternate juror system has experienced a similar developmental pattern. In Rickard v. State, 74 Ind. 275 (1881), it was held *per se* reversible error for a bailiff to be present during the deliberation process because this constituted an invasion of the jury's privacy. In 1974, however, Indiana Trial Rule 47 became effective, which provided that "[a]n alternate juror who does not replace a regular juror shall be discharged *after* the jury brings in its verdict." IND. TR 47(B) (emphasis added). Thus, at any time during the trial or the deliberation process, the alternate juror could take the place of a regular juror and function as fully as any other member of the jury. Johnson v. State, 267 Ind. 256, 369 N.E.2d 623 (1977), *cert. denied sub nom.* Johnson v. Indiana, 436 U.S. 948 (1978). Realizing that the alternate substituted after deliberations had com-

The federal court system, even though exhibiting the time-honored characteristic of resistance to change, has nevertheless also finally responded to the confusion and dissatisfaction expressed by the federal courts over rules 23(b) and 24(c) of the Federal Rules of Criminal Procedure.[252] After almost two decades of inconsistent interpretations,[253] new Federal Rules of Criminal Procedure have been proposed and are being circulated for comment.[254] Proposed rule 23(b) retains the right of stipulation by counsel for the government and the defense and the defendant to a jury consisting of a lesser number than twelve.[255] However, should the court find it necessary to excuse a juror for just cause after the deliberations have commenced, the new rule 23(b) provides that the trial judge, in his discretion, may excuse that juror and submit the case to the remaining eleven jurors, even over an objection to such a procedure by the defendant.[256]

The amendment to rule 24(c)[257] divides that rule into two sections. The new rule 24(c) describes the selection of alternate jurors and provides that the trial judge, in his discretion, shall decide how many, if any, alternate jurors should be retained after the jury retires to deliberate and authorizes the trial judge to retain such alternates separate from the deliberating jury.[258] Rule 24(d) now defines the method of substituting an alternate for a regular juror who has been found unable or disqualified to perform his duties after the deliberations have com-

menced would be at a significant disadvantage, Indiana completed the evolutionary process by allowing the silent alternate to observe the deliberations of the jury. Thus, the most effective alternate juror system has been implemented in Indiana with this decision. *See* Johnson v. Duckworth, 650 F.2d 122 (7th Cir. 1981) (per curiam).

252. *See* note 98 *supra* and accompanying text.

253. *See* notes 49-98 *supra* and accompanying text.

254. *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Oct. 1981) [hereinafter cited as PROPOSED FED. R. CRIM. P.].

255. *See* notes 23 & 51 *supra* and accompanying text.

256. The new Proposed Federal Rule of Criminal Procedure 23(b) provides:

> (b) *Jury of Less Than Twelve*. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. *Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.*

PROPOSED FED. R. CRIM. P. 23(b). *Compare* PROPOSED FED. R. CRIM. P. 23(b) *with* FED. R. CRIM. P. 23(b) at note 51 *supra*.

257. *See* note 52 *supra*.

258. Proposed Federal Rule of Criminal Procedure 24(c) provides, in part:

> *Alternate jurors shall not be present at the deliberations of the jury, but such number as the court shall, in its discretion, decide to be necessary shall be retained and not discharged while the jury is deliberating.*

PROPOSED FED. R. CRIM. P. 24(c).

menced. In this instance, only an alternate juror who has been retained pursuant to the new rule 24(c) can be substituted. After such a substitution, the trial judge must instruct the entire jury to begin deliberations anew.[259] The proponents of the two new rules have expressed a preference for the rule 23(b) approach.[260]

While the efforts of the drafters, at least in their recognition of the need for revision, are commendable, the proposed rules still fall far short of being the best available options. Proposed rule 23(b) is particularly distressing in that it will literally force a defendant to succumb to a federal jury comprised of less than twelve members when the trial judge deems this to be an available alternative.[261] Indeed, the constitutionality of this rule can seriously be questioned under the considerable precedent of the United States Supreme Court holding that trials to twelve-member juries are constitutionally mandated in federal courts and cannot be infringed upon by the legislature unless voluntarily waived by the defendant with the consent of counsel.[262] The problems with the "isolation until substitution" procedure, the system that would

259. Proposed Federal Rule of Criminal Procedure 24(d) provides:

(d) *Replacing a Juror. Alternate jurors in the order in which they are called shall replace jurors who become or are found to be unable or disqualified to perform their duties. After the jury has retired to consider its verdict, a juror may be replaced only by an alternate juror retained as provided in subsection (c) of this rule, in which case the court shall instruct the entire jury to commence their deliberations anew.*

PROPOSED FED. R. CRIM. P. 24(d). *Compare* PROPOSED FED. R. CRIM. P. 24(c) and (d) *with* FED. R. CRIM. P. 24(c) at note 52 *supra*.

260. PROPOSED FED. R. CRIM. P. 23 (Introductory Comment). Even though amendments to both rules 23(b) and 24(c) are being circulated, only one of these amended rules realistically need be implemented. If rule 23(b) is adopted, there would be no need to also adopt rules 24(c) and (d). If a juror becomes ill or unable to continue after deliberations have commenced and the defendant refuses to stipulate to a lesser-numbered jury than twelve, the trial judge may submit the case to the remaining eleven jurors. Thus, rules 24(c) and (d) could be characterized as inconsistent. The main problem to be resolved is which rule—23(b) or 24(c) and (d)—would take precedence. If rules 24(c) and (d) were adopted, rule 23(b) appears to be unnecessary. In one situation, however, both rules may be applicable at once. If alternate jurors are chosen and retained by the trial judge in accordance with rule 24(c) and they are substituted until there are no remaining alternates in accordance with rule 24(d), should a regular juror then become ill or unable to continue, rule 23(b) would allow the trial judge to submit the case to the remaining eleven jurors. It should be noted, however, that the likelihood of this occurrence is small. It has also been proposed that the defendant be given the option to elect between the two proposed rules at some point in time. If both rules are viewed as advantageous, this could present a viable solution. However, problems could arise in defining the appropriate point in time at which such an election should be made and as to who should decide which option should be elected. *Id.*

261. *See* note 256 *supra* and accompanying text.

262. *See* Johnson v. Louisiana, 406 U.S. 356, 370 n.5 (1971) (Powell, J., concurring in Apodaca v. Oregon, 406 U.S. 404 (1972)); Duncan v. Louisiana, 391 U.S. 145, 213 (1968); Patton v. United States, 281 U.S. 276, 288-90 (1930); Maxwell v. Dow, 176 U.S. 581, 586 (1900); Thompson v. Utah, 170 U.S. 343 (1898). In *Patton*, it was expressly stated that the common law elements of a jury trial are embedded in the provisions of the federal Constitution and must be adhered to by the federal courts. One of these elements is that the "jury should consist of twelve men, neither more nor less" and these elements "are beyond the authority of the legislative department to

be implemented by the new rules 24(c) and (d),[263] have already been discussed; the shortcomings of this system need not be emphasized again.[264]

While the effectiveness of the Proposed Federal Rules of Criminal Procedure is subject to sharp criticism, it is interesting to compare the development of the federal alternate juror system with the similar development of the California and Indiana systems.[265] A careful examination of the evolutionary scheme taking place in the alternate juror system reveals a three-stage process. The first stage of the process is the absolute privacy of the jury deliberations. Consequently, a major feature of this stage is that substitution is only allowed up until the jury retires to deliberate.[266] The second stage, the "isolation until substitution" procedure, is entered when the first stage proves to be ineffective in accomplishing the desired result.[267] Finally, the third stage, that in which California and Indiana are present today, is adopted when the jurisdiction realizes that in the interest of efficiency and effectiveness, and with reasonable safeguards, an alternate can constitutionally be permitted to observe silently the deliberation process. Thus, the federal alternate juror system, even though subject to criticism, can be viewed as simply entering the second stage of the evolutionary scheme. It is evident that, with the federal courts already criticizing the *procedure* proposed by the new rules 24(c) and (d),[268] with at least one federal court of appeals sanctioning the silent presence of the alternate juror in the deliberation room,[269] and with the proponents of the new Federal Rules of Criminal Procedure at least considering the possibility of "having the alternates remain with the jury from the very outset of the deliberations,"[270] the federal system will arguably reach the third stage of this evolutionary process. Viewed in this perspective, the Proposed Federal Rules of Criminal Procedure[271] would seem to support the alternate juror system as it has developed in Indiana.

destroy or abridge." 281 U.S. at 288, 290. However, a defendant may voluntarily waive this common-law right in federal courts. *Id.* at 312. *See also* notes 23 & 50 *supra*.

263. *See* notes 258-59 *supra* and accompanying text.

264. *See* notes 235-40 *supra* and accompanying text.

265. *See* notes 243-51 *supra* and accompanying text..

266. *See* note 243 *supra* and accompanying text.

267. *See* notes 235-46 & 251 *supra* and accompanying text.

268. *See* United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975) (the court enumerated very strong policy arguments against substitution of an alternate juror after commencement of deliberations). *See also* notes 236-38 *supra* and accompanying text.

269. *See* United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

270. PROPOSED FED. R. CRIM. P. 23 (Introductory Comment).

271. *See* notes 256 & 258-59 *supra*.

Limitations of Alternatives Outside the Alternate Juror Realm

While the alternate juror procedure adopted by the Indiana courts apparently presents the best possible solution to the incapacitation-of-the-regular-juror dilemma, there are two procedures outside the alternate juror realm which are also intended to aid in this situation. Unfortunately, these alternatives may be literally unavailable to either the court or the defendant. Under the first procedure, the stipulation process, a defendant may waive his right to a jury trial altogether or stipulate to a lesser-numbered jury than the jurisdiction requires.[272] This procedure was initially announced in *Patton v. United States*,[273] and Federal Rule of Criminal Procedure 23 was promulgated subsequent to and relying upon the *Patton* decision.[274] Consequently, the federal rule provides that a defendant may stipulate to a jury numbered less than twelve,[275] even though twelve-member juries are constitutionally required in federal courts.[276] Thus, if a regular juror becomes ill or unable to continue after deliberations have commenced, the defendant can stipulate that the eleven remaining eligible jurors can render a binding verdict.[277] However, this procedure may no longer be constitutional today in those jurisdictions that provide for six-member juries. Since *Ballew v. Georgia*,[278] a jury consisting of less than six members is constitutionally insufficient. Thus, it is uncertain whether a defendant

272. *See* Patton v. United States, 281 U.S. 276 (1930). *See also* notes 23 & 50 *supra* and accompanying text for a discussion of the *Patton* decision.

273. 281 U.S. 276 (1930).

274. *See* FED. R. CRIM. P. 23 (Practice Comment and Advisory Committee's Note—1946); United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964).

275. *See* note 51 *supra*.

276. *See* Johnson v. Louisiana, 406 U.S. 356 (Powell, J., concurring in Apodaca v. Oregon, 406 U.S. 414 (1972)); Duncan v. Louisiana, 391 U.S. 145 (1968); Patton v. United States, 281 U.S. 276 (1930); Maxwell v. Dow, 176 U.S. 581 (1900).

277. *See, e.g.*, Williams v. United States, 332 F.2d 36 (7th Cir. 1964). *See generally* FED. R. CRIM. P. 23(b) (Advisory Committee's Note—1946, 1977). Nevertheless, the holding in *Patton* has been interpreted in some states to allow the defendant to stipulate to the alternate's silent presence in the deliberation room. *See* People v. Valles, 24 Cal. 3d 121, 154 Cal. Rptr. 543, 593 P.2d 240 (1979). Additionally, even though the Federal Rules of Criminal Procedure plainly provide for no such stipulation to the presence of an alternate juror during the deliberation process, or for the substitution of an alternate for a regular juror after deliberations have commenced, *see* notes 51 & 52 *supra*, some circuit courts have adopted this procedure, again on the authority of *Patton*. *See* United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); Leser v. United States, 358 F.2d 313 (9th Cir.), *cert. dismissed*, 385 U.S. 802 (1966), *petition to vacate denied*, 390 F.2d 634 (9th Cir.), *cert. denied*, 391 U.S. 953 (1968). No reason has been given for this adoption of the *Patton* criteria in the alternate juror setting. Nevertheless, the apparent theory seems to be that, if a defendant can waive the constitutional right to trial by jury of the statutorily required number of jurors, he can waive any other right that goes to the essence of the jury deliberation process, such as the number of jurors in the deliberation room and when the jurors can be substituted yet retaining the statutorily required number of jurors. *See also* notes 58 & 66 *supra* and accompanying text.

278. 435 U.S. 223 (1978). *See* note 123 *supra*.

in a state proceeding may stipulate to a lesser-numbered jury when the jury consists of only six members to begin with.[279] The second alternative is simply to declare a mistrial. The problems with this procedure are inherent in the complexity and expense of the legal system itself and could pose grave hardship for a defendant who has exhausted his resources on one trial.[280] Thus, as concluded by the Seventh Circuit, while not perfect, the procedure adhered to by the Indiana courts may truly present the best possible use of the alternate juror system.[281]

Finally, there is one factor, though never expressly discussed by the Seventh Circuit, that was arguably a major consideration influencing their decision. This factor is money. That litigation is expensive is a fact that cannot be disputed. Consequently, any constitutional procedure that will reduce court and litigation time and expense should be carefully analyzed and implemented. This does not advocate the infringement of individual rights in the name of economy; rather, it emphasizes that when a constitutionally permissible procedure is discovered that saves times and money and is effective, such as the Indiana procedure at issue here, resistance to change should give way to innovation and enhanced efficiency.[282]

A Potential Criticism of the Seventh Circuit Decision

The Indiana Supreme Court and the Seventh Circuit, however, may both be criticized as ignoring one crucial element in their approval of the silent alternate juror procedure—the element of prejudice to the defendant.[283] The most obvious explanation for the omission is simply

279. One might, nevertheless, argue that Patton v. United States, 281 U.S. 276 (1930), would still allow such a substitution. When *Patton* was decided in 1930, twelve-member juries were constitutionally mandated in federal courts. *See* notes 20 & 262 *supra* and accompanying text. Thus, the *Patton* decision allowed the defendant to stipulate to a trial with less than the constitutionally required number of jurors. 281 U.S. at 288-90. However, in 1930, there was no constitutionally insufficient number of jurors. It was in 1979, in Burch v. Louisiana, 441 U.S. 130 (1979), that the United States Supreme Court determined that a five-member jury was unconstitutional. Thus, it is unclear whether a defendant may stipulate to a constitutionally insufficient jury of five when the jury has only six members to begin with. *See also* Johnson v. Duckworth, 650 F.2d 122, 126 n.10 (7th Cir. 1981) (per curiam).

280. 650 F.2d at 126. The court, the attorneys, the witnesses and the jurors are also put in an uncomfortable position if a mistrial is deemed necessary. The judge may have to relinquish the case after much research, counsel may be discharged after much time and effort because of lack of funds for continued employment, witnesses will be forced to appear in court once again and the jurors may feel that their time was completely wasted, thus resulting in a poor impression of the legal system itself. *Id.*

281. *Id.*

282. *See, e.g.*, Henderson v. Lane, 613 F.2d 175 (7th Cir. 1980); People v. Valles, 24 Cal. 3d 121, 154 Cal. Rptr. 543, 593 P.2d 240 (1979); State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975) (Huskins, J., dissenting).

283. *See* Johnson v. State, 267 Ind. 256, 369 N.E.2d 623 (1977), *cert. denied sub nom.* Johnson

that it was not at issue on appeal to the Indiana Supreme Court or to the federal courts. While Johnson objected in the trial court to the alternate's presence in the deliberation room, he never requested a hearing subsequent to verdict to determine any possible prejudice.[284] Consequently, no hearing was conducted to see whether there was any juror misconduct or participation by the silent alternate.[285] In the absence of evidence of misconduct or participation by the silent alternate juror, no prejudice should be presumed by the court.[286]

There may, nevertheless, be other reasons why the prejudice element was not mentioned. In order to determine whether the defendant was "prejudiced," the court must be able to define "prejudice" in the context of the alternate juror procedure. The definition of prejudice in the conventional sense refers to a forejudgment, bias, or preconceived notion—a leaning towards one side of a cause for some reason other than a conviction of its justice.[287] The Tenth Circuit, in *United States v. Beasley*,[288] concluded that, in the alternate juror context, "it is difficult to see how a test of 'prejudice' can be applied."[289] The silent alternate juror is as equally qualified as the regular jurors; thus, it is difficult to see how his or her presence can be considered "prejudicial."[290]

Most jurisdictions that purport to account for prejudice simply provide that if the observant alternate did or said anything to influence the deliberating jury, or expressed an opinion or conclusion, that this will be seen as prejudicial enough to mandate reversal.[291] But, again, this is not really related to "prejudice." Such acts would more appropriately be labeled attempts to influence the deliberating jury or to invade their deliberations. Such participation could then be attacked on the theory that there were more than the legislatively required number of jurors actively participating in the actual deliberation process. Thus, the use of a "prejudice" standard, at least in its conventional definition,[292] is arguably an inappropriate standard by which to measure a silent alternate juror's impact upon a deliberating jury.

v. Indiana, 436 U.S. 948 (1978). The Indiana Supreme Court never discussed the issue of prejudice and Justice Pivarnik, dissenting, emphasized this as a major flaw in the majority's decision. *Id.* at 260, 369 N.E.2d at 625 (Pivarnik, J., dissenting).

284. *See* notes 145-46 *supra* and note 300 *infra* and accompanying text.

285. *See* notes 145-46 *supra* and accompanying text.

286. *See* notes 222-23 *supra* and accompanying text.

287. BLACK'S LAW DICTIONARY 1061 (5th ed. 1979).

288. 464 F.2d 468 (10th Cir. 1972). *See* notes 74-78 *supra* and accompanying text.

289. 464 F.2d at 470.

290. *Id.*

291. *See, e.g.*, United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); United States v. Beasley, 464 F.2d 468 (10th Cir. 1972).

292. *See* note 287 *supra* and accompanying text.

Assuming prejudice could be satisfactorily defined in the alternate juror context, the next problem concerns how to determine whether there was such prejudicial participation. Opponents of the prejudice standard argue that a hearing to determine whether the alternate's presence prejudiced the deliberating jury would be impractical, inadequate, and a dangerous intrusion into the proceedings of the jury.[293] On the other hand, the justices who think prejudice should be taken into account also argue that an evidentiary hearing to determine prejudice would, in and of itself, be a dangerous intrusion into the jury deliberation process.[294] The result would seem to be that an evidentiary hearing should be limited to determining only whether the silent alternate juror said or did anything that the deliberating jury noticed or was aware of. But the mere fact that an alternate made a gesture or uttered an innocuous statement should surely not rise to the level of "prejudice" sufficient to require a mistrial.[295]

Finally, even if Indiana did grant such a hearing to determine any possible "prejudice," there is a question of how much information the jurors would be required to reveal of the deliberation process. In *Turczi v. State*,[296] the Indiana Supreme Court determined that an alternate, just as a regular juror, may not, by affidavit, impeach the verdict of the jury.[297] In holding that the sanctity of verdicts would be diminished, that no verdict would ever be final and that jurypersons would forever be harassed, the court imposed this rule upon alternates as well as regular jurors. However, the impact of *Turczi* upon the silent alternate juror procedure can be viewed as dichotomous. If a hearing to determine prejudice attempted to reveal the substance of the deliberations, *Turczi* would preclude such a hearing. On the other hand, if an evidentiary hearing was simply limited to the determination of whether the alternate said or did anything, the *Turczi* decision would not seem to preclude this type of hearing.[298] Even so, the mere fact that an alternate said or did anything, as pointed out previously, need not result in

293. *See* United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978); United States v. Beasley, 464 F.2d 468 (10th Cir. 1972).

294. *See* Johnson v. State, 267 Ind. 256, 369 N.E.2d 623 (1977), *cert. denied sub nom.* Johnson v. Indiana, 436 U.S. 948 (1978) (Pivarnik, J., dissenting).

295. *See* La-Tex Supply Co. v. Fruehauf Trailer Div., Fruehauf Corp., 444 F.2d 1366 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971). *See also* note 97 *supra* for a discussion of the facts in *La-Tex*.

296. 261 Ind. 273, 301 N.E.2d 752 (1973).

297. *Id.* at 275, 301 N.E.2d at 753.

298. In fact, Indiana does allow hearings where there is evidence of misconduct or communications between the bailiff and the jury. *See* Sparks v. State, 154 Ind. App. 691, 290 N.E.2d 793 (1972). It should be pointed out, however, that this type of communication is expressly prohibited by statute. *See* note 149 *supra*.

a "prejudice *per se*"[299] standard such that a mistrial must be declared. In any event, because there was no evidence that the silent alternate juror had any impact upon the deliberating jury, no "prejudice" was presumed by the Seventh Circuit.[300]

Future Considerations

The Seventh Circuit's holding expands the boundaries of the traditional alternate juror system.[301] If kept within the requirements set down by the Indiana courts, the system will enhance the efficiency of the entire trial system by eliminating numerous mistrials with the inherent benefit of decreasing the time and expense involved in all types of litigation.[302] Nevertheless, there are still problems with the proposed

299. A "prejudice *per se*" standard would conclude that prejudice can be inferred from the mere fact that an alternate said or did anything. *See* note 76 *supra*.

300. In terms of the possible effects that a silent alternate juror may have on the deliberation process, it is interesting to note the results of a recent study conducted at the University of California. *See* Bridgeman & Marlowe, *Jury Decision Making: An Empirical Study Based on Actual Felony Trials*, 64 J. APPLIED PSYCH. 91 (1979) [hereinafter cited as Bridgeman & Marlowe]. This study is heralded by its authors as the first of its kind to study what actually transpires in the jury room deliberations. One previous effort by another author to record surreptitiously actual deliberations provoked such an indignant reaction by the courts that no further attempts have been made to conduct such a study. This study was conducted as an interview after ten criminal trials in California had been completed; the response in and of itself may indicate the seriousness with which the jurors take their responsibilities. Despite the support of the county district attorney, the offer of a moderate sum of money to participate in the interview, one follow-up letter and two phone calls to the reluctant jurors, the authors were never able to secure the cooperation of more than seven jurors from any one trial. *Id.* at 92. The questions asked of the jurors dealt largely with the actual deliberations and rather surprising results were discovered: (1) the majority of jurors, once having voted on the first ballot, did not change their vote; (2) the jury deliberations themselves did not appear to be a significant factor in forming juror opinion or in determining final voting behavior; rather, these deliberations were often viewed as justifications for the verdicts the jurors had already formed; and (3) the large majority of jurors had made up their mind as to a verdict before the deliberation process began. Most jurors justify their final verdict largely on the basis of what occurs during the course of the trial. *Id.* at 94-96. *Accord* United States v. Young, 301 F.2d 298, 299 (6th Cir. 1962). It was found that jurors relied primarily on the evidence and did not appear to be influenced by subtle sociopersonal considerations. It seemed rather likely that real jurors did succeed in ignoring extraneous and subtle features of the trial process. Bridgeman & Marlowe at 98. *Accord* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 488-91 (1971). These results could suggest that the presence or absence of an alternate juror during the deliberation process would have little or no impact on the deliberations or the final verdict of the individual jury members.

301. *See* notes 33-36 *supra* and accompanying text.

302. The silent alternate juror procedure has already been used in at least one civil case. *See* La-Tex Supply Co. v. Fruehauf Trailer Div., Fruehauf Corp., 444 F.2d 1366 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971). *See also* note 97 *supra* for a discussion of *La-Tex*. *Cf.* Vander Veer v. Toyota Motor Distrib., 282 Or. 135, 577 P.2d 1343 (1978) (relying on an Oregon statute requiring dismissal of the alternate when the jury retires to deliberate, the Oregon Supreme Court found reversible error when two alternates accompanied the regular jurors to the jury room; however, it should be noted that, in this civil case, the alternates had participated in the vote on the issue of liability).

procedure which will require careful consideration by courts in the future.

The first of these problems concerns who should decide when, and if, an alternate juror should accompany the regular jury to the jury room for silent observation. The ideal solution to this problem, the solution adopted in Indiana, is to place the decision solely within the discretion of the trial judge.[303] This practice will eliminate the controversy that has arisen in some courts as to whether the defendant must personally consent to the alternate's silent presence.[304] Furthermore, there will be no infringement upon the defendant's right to trial by jury because the defendant is still being tried by the legislatively required number of jurors; the procedure merely decreases the possibility of a mistrial. This solution also obviates consent by counsel. While counsel for the government should have little objection to the silent alternate's presence,[305] it is apparent from the objections raised to the procedure that defense counsel obviously feel a tactical advantage will be gained by the necessity of a new trial, not the least of which has been the exposure of the prosecution's case.[306] While the defense counsel's motives in attempting to provide the client with the best possible defense certainy cannot be faulted, such motives should not outweigh the defendant's right to a fair trial with a legislatively determined jury size and the state's interest in providing the defendant with such a trial economically. Consequently, placing the decision solely within the trial

303. Placing the decision solely within the discretion of the trial judge in the silent alternate juror context should not be likened to the procedure suggested by Proposed Federal Rule of Criminal Procedure 23(b), *see* notes 256 & 261-62 *supra* and accompanying text. The ultimate effect of proposed rule 23(b) would force a defendant to succumb to a lesser-numbered jury than that constitutionally mandated in the federal courts if the trial judge deemed this to be an available option. In the alternate juror situation, however, allowing the trial judge, in his discretion, to send an alternate to silently observe the deliberation process ensures that the defendant will be tried by the legislatively preferred number of jurors and reduces the likelihood that the defendant will have to undergo another trial if one of the regular jurors cannot complete the deliberation process.

304. *See* United States v. Allison, 481 F.2d 468 (5th Cir.), *aff'd*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); Leser v. United States, 358 F.2d 313 (9th Cir.), *cert. dismissed*, 385 U.S. 802 (1966), *petition to vacate denied*, 390 F.2d 634 (9th Cir.), *cert. denied*, 391 U.S. 953 (1968); United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964); People v. Britton, 4 Cal. 2d 622, 52 P.2d 217 (1935).

305. This statement is based upon the assumption that counsel for the government has expended its best efforts in the trial at hand and has a sincere interest in the expedient resolution of all cases it presents in terms of fairness, time and expense.

306. Other defense counsel considerations in favor of a new trial include such things as: the longer the postponement of trial, evidence becomes stale; witnesses' memories are not as clear; any bad publicity may have subsided; the prosecutor may be more willing to plea bargain; the defendant is presumably out on bail longer; a new trial presents an opportunity to correct any errors made in the first trial.

judge's discretion is the most reasonable and objective method available.

Even if the decision to send an alternate into the jury room to silently observe the deliberations is made solely at the trial judge's discretion, there is still the problem of when this procedure should be followed. This decision should also be left to the trial judge's sound discretion; however, a common sense standard should obviously prevail and the judge's discretion must be carefully exercised. If it is apparent to the judge, on the basis of experience and the nature of the case, that the jury should arrive at a verdict relatively early in the deliberation process, then the judge may decide that no silent alternate should be present. However, even if the nature of the case suggests an early verdict, the judge may still determine that an alternate should be present based on the composition of the regular jury itself.[307] In all situations, however, the trial judge's discretion should be respected and the decision to send in an alternate who is not needed or the failure to send in an alternate who was needed, with a resulting mistrial, should not result in criticism of the judge's exercise of discretion.

In considering which alternate juror should accompany the regular jury to the jury room, judicial discretion is unnecessary. There are two completely objective means of choosing the silent alternate and both should be considered acceptable by the court, the defendant and counsel. The first method would allow the first alternate chosen during the voir dire examination to accompany the jury. The second procedure is simply to choose by lot from the alternates available at the completion of the trial.

Even after the process of selection, instruction and retirement to the jury room of the silent alternate has been successfuly completed, courts may still find themselves in a very difficult situation if the defendant claims that he was "prejudiced" by the silent alternate's presence. One form of "prejudice" that may be claimed is that the physical manifestations of the alternate may influence the deliberating jury.[308] If this notion persists—that facial expressions and subtle gestures may have the effect of influencing or inhibiting the deliberating jurors—the obvious solution is simply to isolate the alternate in an area where he can hear the deliberations but cannot see, or be seen by, the deliberating jurors. The purpose of his presence in the jury room is only to hear

307. Rather extreme examples of situations when a judge may think it wise to send in a silent alternate on a relatively simple or clearcut case would be when a regular juror is nine months' pregnant or very old.

308. *See* notes 219-23 *supra* and accompanying text.

what has previously transpired so that he will not be ignorant of the discussions if he is required to replace one of the deliberating jurors. There is no corresponding requirement that he also be able to see the individuals making certain statements. Further, no elaborate changes of the jury room need occur to effectuate this separation. The only alteration required is the erection of a portable panel between the deliberating jurors and the alternate.

Finally, the "prejudice" standard has yet to be adequately defined in the silent alternate juror context and the complete disregard of "prejudice" by the Indiana Supreme Court and the Seventh Circuit Court of Appeals may suggest either that there is no adequate definition or that there simply is no prejudice.[309] It is arguable that there is no "prejudice" in the conventional sense of the term; had the silent alternate been "prejudiced," he would have been eliminated through voir dire.[310] Thus, "prejudice" should perhaps be eliminated as a criterion in determining whether reversal is required or not.

It is possible that purely a semantic change would eliminate this definitional problem. A better standard would perhaps ask whether the deliberating jury was "influenced" by the silent alternate in any manner. However, even this standard would be subject to criticism because the courts are ambiguous as to what actions of a silent alternate juror would be regarded as "attempts to influence" the deliberating jury. Subtle gestures and innocuous statements surely should not rise to the level of "influence" such that reversal would be required.[311] Yet, a more detailed attempt to determine the silent alternate's influence upon the deliberating jury may be considered a dangerous intrusion into the privacy of the jury deliberations.[312] Consequently, in the absence of any evidence of juror misconduct or participation by the alternate, no influence on the deliberations of the jury by the silent alternate's presence should be presumed by the court.

CONCLUSION

In *Johnson v. Duckworth*, the Seventh Circuit was required to determine the constitutionality of an Indiana trial court procedure that allowed an alternate juror to silently observe the jury deliberation process. This procedure was followed in order to prevent a mistrial if one

309. *See* notes 283-300 *supra* and accompanying text.

310. *See* note 287 *supra* and accompanying text for the definition of "prejudice."

311. *See* La-Tex Supply Co. v. Freuhauf Trailer Div., Fruehauf Corp., 444 F.2d 1366 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971). *See also* note 97 *supra* for a discussion of *La-Tex*.

312. *See* notes 293-95 *supra* and accompanying text.

of the regular jurors became ill or unable to continue after deliberations had commenced. This specific procedure was implemented to ensure that the substituted juror would be fully apprised of the previous deliberations and, thus, would be voting after a thorough examination of the case. In upholding the Indiana trial court procedure, the Seventh Circuit held that the silent presence of an alternate juror during the deliberation process does not violate a defendant's constitutional right to trial by jury. In so holding, the court examined the particular type of encroachment upon the privacy of the jury deliberation process and concluded that the silent alternate's presence was not the type of invasion that would impair the purpose of the jury trial or inhibit the jury's ability to debate.

The Seventh Circuit's holding in this case required two underlying decisions. First, that state and federal jury practice need not be in conformity, and second, that the right to jury privacy does not require absolute privacy. Once the independence of state and federal jury practice was acknowledged, the court was required to determine the degree of privacy that was constitutionally mandated. While the jury is protected against the intrusion of outsiders into the privacy of their deliberations, the silent alternate was not found to be the typical outsider from which the jury might need insulation. The alternate had been subjected to the same selection process and had been exposed to the same evidence. Consequently, the silent alternate was not found to be an outsider from which the jury needed protection and was not such an intrusion into the privacy of the deliberation process that the jury's ability to debate freely would be hampered.

While the procedure utilized by the Indiana trial court was clearly constitutional, the most persuasive reasons behind the Seventh Circuit's opinion were the policy considerations underlying its decision. Finding that the alternate juror procedures in the majority of jurisdictions were inadequate to accomplish the purpose of preventing the multitude of mistrials experienced when regular jurors became ill after deliberations had commenced, the court determined that the Indiana procedure was, in fact, perhaps the most effective procedure available. The system employed by the Indiana trial court enabled Indiana to maintain a more efficient trial system and this alternate juror procedure truly utilized alternate jurors to their fullest potential.

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